IN THE

Supreme Court of the United States

DOCKET NO. 78-1311

UNITED STATES EX REL. MARSHALL P. SAFIR and MARSHALL P. SAFIR,

Petitioners,

vs.

AMERICAN EXPORT LINES, LYKES BROS. S.S. CO. INC., AMERICAN PRESIDENT LINES, FARRELL LINES INC., PRUDENTIAL LINES INC., P.S.S. STEAMSHIP CO. INC., UNITED STATES LINES INC., MOORE McCORMACK LINES INC.,

Respondents.

Petition for Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES EX REL. MARSHALL P. SAFIR
and MARSHALL P. SAFIR,

Petitioners,

vs.

AMERICAN EXPORT LINES, LYKES BROS. S.S. CO. INC., AMERICAN PRESIDENT LINES, FARRELL LINES INC., PRUDENTIAL LINES INC., P.S.S. STEAMSHIP CO., INC., UNITED STATES LINES INC., MOORE McCORMACK LINES INC.,

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner Marshall P. Safir, individually as well as for the United States of America respectfuly prays that a Writ of Certiorari issue to review the affirmation by the United States Court of Appeals for the Second Circuit of the judgment of the federal district court below dismissing the Petitioner's *qui tam* action for lack of jurisdiction. This case involves novel questions of federal law directly

pertaining to the proper interpretation of the jurisdictional provisions of the False Claims Act (31 U.S.C. §231 *et seq.*) and the propriety of the application of those provisions so as to bar the Petitioner's *qui tam* action. The Petitioner's action brought to light an uncontroverted fraud perpetrated upon the United States of America by a group of subsidized government contractors through bribery and collusion with ex-President Richard Nixon and others to frustrate the recovery of moneys illegally claimed and paid out of the Treasury of the United States.

OPINIONS

The Opinion of the Court of Appeals for the Second Circuit is reported at 579 F.2d 742 (1978), and appears in the Appendix at page 15a. The Court of Appeals' Order denying the Petition for Rehearing and Rehearing En Banc on November 28, 1978 appears at page 3a. The Court of Appeals' Order denying the Petition in the Appendix at page 5a. The unreported Memorandum Opinion of the federal district court below appears in the Appendix at page 25a.

Prior opinions in related actions instituted by Petitioner are:

Safir v. Gibson, 417 F.2d 972 (2nd Cir. 1969) SAFIR I.

Safir v. Gibson, 432 F.2d 137, 145 (2nd Cir. 1970) *cert. denied*, 400 U.S. 850 (1970) *cert. denied also sub nom. American Export Lines Inc. et al. v. Gibson*, 400 U.S. 942 (1970) SAFIR II.

Safir v. Blackwell, et al., 469 F.2d 1061 (2nd Cir. 1972) SAFIR III.

Safir v. Kreps, et al., 551 F.2d 447 (D.C. Cir. 1977) *cert. denied*, 46 U.S.L.W. 3215 (1977) SAFIR IV.

Also Maritime Subsidy Board Investigation of Alleged Section 810 Violation S-243, 14 Pike & Fisher Shipping Reg. Reporter 77, 78 (1973) also 13 SRR 809 (1973) and 12 SRR 1105 (1972).

JURISDICTION

The Court of Appeals for the Second Circuit affirmed the judgment of the federal district court on June 27, 1978. A timely Petition for Rehearing and Rehearing on En Banc was denied on November 28, 1978. This Petition for Certiorari is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1970).

STATUTES INVOLVED

The False Claims Act, 31 U.S.C. 232(a)(b)(c)(e), 233, 235 (Appendix p. 165a).

The Merchant Marine Act of 1936—Sec. 810, 46 U.S.C. 1227 (Appendix p. 164a).

QUESTIONS PRESENTED

1. Whether the jurisdictional provisions of Sec. 232 (c) of the False Claims Act should be interpreted and applied in a manner which denies access to the federal courts by a private suitor when the information he gave regarding the fraud prior to filing suit was given to those government officials who had entered into a corrupt arrangement with the perpetrators of the fraud and whose interest it was to conceal the fraud and to defeat its prosecution.

2. Whether without raising the issue of government complicity which singularly exists here, the 9th Circuit's *literal* reading of 31 U.S.C. 232(c) is a proper interpretation or whether the 2nd Circuit's interpretation of a *liberal* reading would more effectively carry out the legislative intent of the section in suits which are not considered parasitical.

STATEMENT OF THE CASE

This petition stems from the affirmation by the United States Court of Appeals for the Second Circuit of an order of dismissal on jurisdictional grounds by Judge John F. Dooling Jr. U.S. District Court for the Eastern District of New York of a civil action under the False Claims Act 31 U.S.C. 231, 232, 233 and 235 for a judgment declaring the defendants liable for penalties and for refund of double the sums paid out to the shipping lines found in violation of Sec. 810 of the Merchant Marine Act of 1936 (46 U.S.C. 1227) as a consequence of the collateral estoppal effect of this violation on 31 U.S.C. 231, the False Claims Act (hereinafter referred to as FCA) and for an order implementing such recovery on behalf of the petitioners herein, United States of America, ex rel Marshall P. Safir and Marshall P. Safir. This action was filed on May 27, 1977 under Docket 77C-1093 and is separate and distinguishable from Docket 68C-643 which is the subject matter of Petition for Certification, Docket 78-1239.

Petitioners alleged that the illegal behavior was in violation of the operating differential subsidy contract signed between the government and the contractors incorporating the wording of Sec. 810, and that the clear provision of the statute and subsidy contracts, both binding on the defendants, were deceitfully violated when without any overture to the Department of Commerce they acted in concert to destroy an unsubsidized American flag competitor. Petitioners further alleged in this complaint which was filed on May 27, 1977 that these actions were inimicable to the interest of the United States in that the weight and leverage of subsidy funding was used to destroy an American competitor without the knowledge of the contracting agency charged with the responsibility for promoting the welfare

of the American Merchant Marine (Complaint Appendix pp. 79a-88a).

Simultaneous with the filing of the complaint a notice of pendency was served on the United States Attorney for the Eastern District of New York and the Attorney General of the United States. This was done in accordance with subsection C of 31 U.S.C. Sec. 232. Appendix page 86a. On June 21, 1977 the office of the United States Attorney for the Eastern District, on behalf of the United States, waived the government's rights in this "Qui tam" action by filing a declination of appearance in the action allowing appellant Safir to proceed on behalf of the United States. App. p. 87a.

No effort was made by the Attorney General to inquire further although relator stated in the notice "If additional information is needed the undersigned is prepared to cooperate fully." In response to a subsequent subpoena by the defendants, relator set forth additional information which he was prepared to offer the Attorney General had he been requested to do so.

As stated by Judge Dooling in his order of dismissal (App. p. 38a). "Plaintiff said he did have information to bring forward at the present time, based on the fact that the case 77C-1093 had been filed. Annex A sets forth the relevant parts of the testimony he then gave about the content of the new disclosures to him." See Annex A, App. pp. 46a-63a.

"The new material related to a "corrupt arrangement to frustrate plaintiff's endeavor to vindicate his claims" whereby for a gross consideration of $7,000,000.00, ex-President Richard Nixon, in the summer of 1968, after nomination and before election, entered into such conspiracy with one Spyros Skouras, Sr. representing the defendants. Since the claims to be vindicated by plaintiff were for the benefit of the United States the conspiracy, in ef-

fect, was against the United States. The purposes and partial accomplishments of this endeavor are set forth in the transcript of the hearing before Judge Dooling on October 28, 1977 (App. pp. 66a-78a).

In short the purpose was to arrange, upon his election, a minimal settlement of the Sapphire Steamship Lines Inc. anti-trust case and to frustrate Petitioner Safir's actions for subsidy recovery for the United States. This was to be done through all means, not excluding judicial influence, administrative harassment, and attrition. This deal is alleged to have been made in 1968 prior to his taking the oath of office. One of the conditions alleged to be precedent was Nixon's agreement to name Skouras's Greek-American friend, Spiro Agnew, as his running mate. For recent related subject matter, *see* N.Y. Times, February 18, 1979 (App. pp. 174a-177a). The $7,000,000.00 fund, upon information and belief, went first to a settlement of $2,400,000.00 for the Anti-Trust Case (see *In the Matter of Sapphire S.S. Lines and J. Read Smith Trustee v. Winthrop Stimson Putnam and Roberts*, 509 F.2d 242, 43, 44 (1975). The remainder of $4,600,000.00 and its whereabouts was the subject of request for subpoena from Judge Dooling which was denied upon dismissal of the case (*See* Motion for Nixon Tapes Appendix pp. 154a-155a).

Defendants moved for summary judgment after the hearing, a Memorandum and Order was filed on December 23, 1977 granting the motion of the defendants on the grounds that the District Court was without jurisdiction to proceed with the case because all of the information necessary for prosecution was already in the hands of the United States at the time the suit was filed. (App. 39a *et seq.*)

The suit *U.S.D.C.* N.Y.E.D. Docket 77C-1093 was filed within 6 years of the time that the final payments were

made as stated in *U.S. v. Klein*, 230 F. Supp. 426 (W.D. Pa. 1964); *aff'd*, 356 F.2d 983 (3rd Cir. 1966)

> ". . . it is the last date when the government paid any money or a particular claim by which anchorage may be had with the jurisdiction required to maintain a false claims action."

See also U.S. v. Bornstein, 423 U.S. 303 (1976).

The court in a peremptory conclusion on *no stated grounds* held that the new material was not germane to the False Claims Act case. Petitioner can only assume that since the corrupt arrangement was concluded in 1968 that it was considered not germane to False Claims filed in 1965, 1966.

The final residual increments of these claims were not vouchered until 1971 however (see Judge Doolings injunction pendente lite app. 103a-108a) *three years after the corrupt arrangement had been established.*

Annex A to Judge Dooling's order is excerpted from the subpoenaed deposition of Marshall Safir by the Contractor defendants. The extrapolation is selective but its implications when taken in the light of the fact that the false claims were being filed 3 years after the corrupt arrangement began destroys the finding of irrelevancy.

The Court of Appeals held that clarification of the meaning of Sec. 232(c) would be of benefit to the Courts in general if the Supreme Court would assume the task. (*See* App. p. 24a).

This petition is companion to Petition 78-1239 *Safir v. Robert W. Blackwell* individually and as Asst. Secy. of Commerce, *et al.* The general fact situation out of which both arose is the same although the questions of law

submitted involve discrete issues which have not been reviewed by this Court, the effect of fraudulent conduct by Government officials on the jurisdictional bars of both Sec. 232(c) (prior knowledge in the hands of the Government) and Sec. 235 (the 6 year statutes of limitations) and the FCA as it applies to prior actions amended under *Rule* 15c of FRCP. That petition was filed on Friday, Feb. 9, 1979. Mr. Blackwell resigned as Assistant Secretary of Commerce for Maritime Affairs on the following Monday, Feb. 12, 1979 (*See* Appendix pp. 168a-169a).

REASONS FOR GRANTING THE WRIT

The dismissal of the complaint herein, see appendix pp. 79a-85a was based on the clause (c) in 31 U.S.C. §232 added by the Act of December 23, 1943, 57 Stat. 608 which reads:

> The court shall have no jurisdiction to proceed with any [*qui tam*] suit whenever it shall be made to appear that such suit was based on evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought.

The Rippetoe exception

Petitioners submit that there is one unassailable exception to this bar to jurisdiction and that is as stated by Chief Judge Parker in *United States v. Rippetoe*, 178 F.2d 735, 736 (4th Cir. 1949), in reversing a similar grant of summary judgment:

> ". . . we do not think that knowledge on the part of a government official who is implicated in the fraud precludes suit by the informer . . ."

Stated by the Court in *Rippetoe, supra*, page 737:

> "It is a well settled principle of law that knowledge of an agent who is engaged in an attempt to defraud his principal will not be imputed to the principal *American Surety Co. v. Pauly*, 170 U.S. 133; 2 Am. Jur. 298-299; ALI Restatement of Agency Sec. 282(1). *Some of the worst frauds upon the government have been those in which officials have participated;* and it is hardly reasonable to suppose that Congress intended to forbid suits by informers based on such frauds, merely because of the knowledge of a false agent who partic-

> ipated in the fraud and whose interest would be to conceal it. There is reason in saying that an informer may not sue on a claim in which those who may be expected to protect the interests of the government have knowledge; and this is clearly what the act means. *This reasoning does not apply, however, where the knowledge is in possession of one who has participated in a fraud on the government and is interested in concealing it.* To so hold would in large measure emasculate the statute and deprive the public of its benefit in cases where it is most needed. It is clear that the amendment enacted into law and the views expressed by Mr. Justice Jackson in his dissenting opinion in United States ex rel. Marcus v. Hess, supra; and it can be as well said of the amended statute as was said in that dissenting opinion of the statute prior to amendment: "If it (the statute) were construed according to its spirit to reward those who disclose frauds otherwise concealed or who prosecute frauds otherwise unpunished, it would serve a useful purpose in the enforcement of the law and protection of the Treasury." (U.S. ex rel. *Marcus v. Hess*, 317 U.S. 537, 63 S. Ct. 391). (Emphasis added)

This unassailed exception has received surprising corroboration in the recent decision in *Chas Pettis ex rel. United States v. Morrison Knudsen, et al.*, 557 F.2d 668 (9th Cir. 1978). Surprising because Judge Sneed for the Court took a completely literal interpretation of §232(c) which is in conflict with the unhappiness in the Second Circuit with such literality (see appendix pages 22a-24a).

The Ninth Circuit in *Pettis, supra* at page 673:

> [4] Our interpretation of the statute is supported by the Third Circuit, which is the only other circuit to have decided the precise question before us. *United States v. Aster*, 275 F.2d 281 (3rd Cir. 1960). Appellant argues that we should not follow Aster, but rather should be guided by the liberal construction

policy he asserts is required by the Supreme Court. It is true that in determining what actions are covered by the term "claim" in the False Claims Act, the Court indicated a narrow construction is inappropriate. *United States v. Neifert-White*, 390 U.S. 228, 88 S. Ct. 959, 19 L.Ed.2d 1061 (1968) (application for a loan treated as a claim). We are not convinced, however, that the Supreme Court would have us abandon the literal interpretation of the jurisdictional bar which, as indicated, is strongly suggested by the available legislative history. It is one thing to extend the reach of the statute to provide additional protection to the United States; it is quite another to permit the bringing of a private suit *after* the United States, being apprised of the facts, fails to act. Public benefit is clearly served by the first; *only by assuming a corrupt and enfeebled federal government would it be unmistakably served by the second. Congress in enacting the 1943 amendments did not proceed on such an assumption nor do we think we should.*[3]

Of course, a different situation exists when the corruption out of which the false claim arose also serves to prevent government action, as where, for example, a corrupt public official who is a party to the fraud prevents governmental action by concealment or otherwise. Under such conditions it is highly artificial to insist that the government "possesses" the information for the purposes of invoking the jurisdictional bar. (Emphasis added)

This differs from the Second Circuit which would reject *Aster, supra*—would question that decision on the grounds that the Third Circuit extended the clause "beyond the evil sought to be remedied and gives it a broader effect than would be indicated by the legislative

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[3] We, of course, disapprove *United States ex rel. Davis v. Long's Drugs, Inc.*, 411 F. Supp. 1144 (S.D. Cal. 1976) to the extent that it suggests that Aster was wrongfully decided and that all provisions of the False Claims Act should be liberally construed to foster claims being brought.

history reviewed by Judge Hastie in the District Court decision . . ."

The conflict should therefore be settled by this Court under the first sentence of *Rule* 19(b) but for the purposes of these petitioners the question raised is only an alternative in the event that this Court upholds the finding that new information of the corrupt scheme hatched in 1968 is *not* germane to the false claims paid in 1971 under a new theory of relevancy.

It suffices for this petition based on a dismissal for lack of subject matter jurisdiction that the allegations regarding the "corrupt arrangement" as set forth in the pleadings (*see* transcript Oct. 28, 1977, appendix pp. 69a-75a) must be accepted as true because they were uncontroverted. *Carr v. Learner*, 547 F.2d 135, 137 (2nd Cir. 1976); *United States v. New Wrinkle Inc.*, 342 U.S. 371, 376 (1976). *Cf.* 5 Wright & Miller, F. P. & P. §§1350 p. 551-553 (1969).

The New Material furnished by Safir is not only germane but Basic to the District Court's Cognizance of the Case

The court in a peremptory conclusion on *no stated grounds* held that the new material was not germane to the False Claims Act case. Petitioner can only assume that since the corrupt arrangement was entered into in 1968 that it was considered not germane to False Claims filed in 1965, 1966. However, the final residual increments of these claims were not vouchered until 1971 (*see* Injunction pendente lite app. 103a-108a). Annex A to Judge Dooling's order is excerpted from the subpoenaed deposition of Marshall P. Safir by the Contractor defendants. The extrapolation is selective but its implications when taken in the light of the fact that the false claims were

being filed 3 years after the corrupt arrangement began destroys the finding of irrelevancy.*

The new material set forth the conspiracy of the defendants working in collusion with the ex-President Nixon through the Department of Commerce and the Assistant Secretaries for Maritime Affairs, Andrew Gibson, and his successor, Robert W. Blackwell, to defeat the relator Safir by concealment of the fraud until more than 6 years had passed from the first filing of vouchers for subsidy payments see Appendix pages 66a-78a transcript of Safir statement at hearing before Judge Dooling October 28, 1977.

In *Safir v. Blackwell, et al.*, Petition 78-1239 the petitioner set forth how the corrupt scheme had blossomed into a wholesale conflict of interest when the National Maritime Counsel was formed. *See* Pet. 78-1239—also page 29, The 32nd Report of the House Committee on Government Operations, 95th Congress 2nd Session No. 95-1680. Union Calendar No. 908 entitled:

"Report on the Problems in the Relationships between the Commerce Dept.'s Maritime Administration and the National Maritime Council, a Private Trade Organization."

While the Nixon appointees, Andrew Gibson and his successor, Robert Blackwell, conducted the investigation of the "alleged" violation of 46 U.S.C. 1227 (Sec. 810 of the Merchant Marine Act) as Assistant Secretaries of Commerce they mantained "intimate daily ties" with the shipping interests affected by Maritime Administration subsidy and regulatory actions. *See* House Report, *supra*,

* There was an imprecise reference to the Special Prosecutor's Office in the Safir deposition (*see* Appendix p. 160a).

The Special Prosecutor, if indeed he did have the information, did not turn over his files to the Attorney General until the summer of 1977 at least one month or more *after* Docket 77-1093 was filed (May 27, 1977).

page 4. Andrew Gibson, prior to assuming his post as Maritime Administrator, had been an employee of Spyros Skouras in Prudential Grace Lines. His successor, Blackwell, in addition to his actions cited in the House Report, *supra*, pages 1-16 and the additional views of Congressman Paul McCloskey was the subject of additional apparent conflict of interest and impropriety in 1976 as described by Congressman McCloskey in the Journal of Commerce article of February 14, 1979, *see* Appendix p. 173a.

So it is abundantly clear that Mr. Blackwell's resignation coming on Monday, Feb. 12 was the result of the filing of the petition against him on Friday, Feb. 9. This statement, while conclusory, cannot be avoided, and it further calls into question the finding in the courts below that the "new material" was not germane to the False Claims Case under the *Rippetoe* and *Pettis* exception to Sec. 232(c). The plain fact is that the government officials who "controlled the prosecution" in this case could not have been those whose interest it was to prosecute the fraud because the knowledge disclosed after the filing of the case by this relator was—as to the prior knowledge freely given before filing U.S. *ex rel. Safir v. American Export, et al.*— the knowledge which eliminated the bar to the Court's jurisdiction.

The answer to the jurisdiction of the Court does not lie in the decision in *U.S. and Aloff v. Aster*, 275 F.2d 281 (3rd Cir. 1960), where the integrity of the officials to whom the information was brought prior to filing suit was not questioned nor does it lie in *U.S. ex rel. Greenberg v. Burmah Oil Ltd.*, 558 F.2d 43, 46 (1977), where the relator developed the preponderance of her information from the public media nor does it resemble *U.S. ex rel. McCann v. Armour & Co.*, 146 F. Supp. 546 *aff'd* 254 F.2d 90 (1958) where the relator had been employed by the government and used evidence obtained during employment.

The answer is to be found in an understanding of Judge Parker's opinion in *U.S. v. Rippetoe, supra,* where government officials whose interest may be to conceal a false claim are distinguishable from those government officials whose knowledge may be expected to protect the interest of the United States.

The answer is to be found in the Second Circuit's own exception in *U.S. ex rel. Greenberg v. Burmah Oil Ltd., supra*:

> "Only where the process of organization produced new information such as the disclosure of the existence or nature of a fraud, could it arguably provide a sufficieint predicate for jurisdiction." (558 F.2d at p. 46)

Can the unrefuted disclosures in the Safir deposition and demand for further discovery through the now available Nixon tapes be summarily dismissed as irrelevant in the light of this exception? (*Cf. Dellums v. Powell,* 516 F.2d 242 (D.C. Cir. 1977) *cert. denied* 98 SCR-234 (1978)).

Unlike "Greenberg" the development of this case was an individual initiative of appellant Safir over a period of 13 years in arduous adversary proceedings in courts and commissions and administrative hearings. The development of the case would not have been accomplished without this effort. Judge Dooling in agreement, states:

> ". . . a great deal of the information and evidence possessed by the government and much of the impetus to action derived from plaintiff."

When Judge Dooling rejected the "serious reservations" about the validity of *U.S. ex rel. Aloff v. Aster, supra,* in *U.S. ex rel. Davis v. Long's Drugs Inc.,* 411 F. Supp.

1144 (S.D. Cal. 1976) presupposed that honest government officials were in control to protect the interests of the United States—and under ordinary circumstances his approach is sound and reasonable—and this respect for the integrity of a co-equal branch of government under most circumstances is right and proper.

But not in this case. The District Court was well aware of the decision in the District of Columbia Circuit in *Safir v. Kreps*, 551 F.2d 447 (1977) and indeed discusses it in his Memorandum (Appendix pages 31a-32a). He repeated Judge Wright's opinion that the Nixon appointee, Secretary of Commerce Frederick Dent, in his order mitigating subsidy recovery to approximately $1,000,000.00 for illegal subsidies paid out in the sum of $227,000,000.00 "gave little assurance that his order resulted from a reasoned decision-making process." In the light of the Safir deposition the Secretary's failure to come to grips with the evidence in the record which had been subject to delay and unwarranted mitigative abuse by the Hearing Examiner and the Maritime Subsidy Board during the years 1970 to 1974 becomes more significant. This failure darkens the conspiratorial coloration and casts a deep shadow on the integrity of the Department of Commerce in the handling of the Safir case from its inception to the holdover Blackwell's resignation.

The public interest would be best served by a liberal interpretation of Section 232(c)

Petitioner Safir submits that where the government waived under Sec. 232(c) by failure to reply to the notice of pendency or declination in writing (as was the case here) and makes no move to oppose the private suitor

from proceeding with the action, that waiver in itself was the predicate for jurisdiction. It represented the position of the United States and a determination from the Safir disclosures before, during and after the filing of the FCA case in Docket 77-1093 the measure of its own rights and the method by which relief should be obtained.

In the game of football the option to punt is within the measure of the rights of the team in possession of the ball. A punt in this manner could, as stated above, be an effective tool against "graymail" or merely an embarrassing lack of diligence by what Judge Friendly calls the "law offices" of the government.

The Northwestern University L. Rev. 67:446 (1972): "*Qui tam* suits under the False Claims Act: Tool of the Private Litigation in Public Actions" at pages 470-471 raises a question which, because of the gross nature of the fraud alleged here and the fact that the recipients of the alleged bribe were in so exalted a position as to, in the words of Judge Sneed in *Pettis* "enfeeble" the government, whether the 1943 Amendment to 232(c) has the effect of prohibiting a *qui tam* action where the government possesses evidence of the false claim *but is unable or unwilling to prosecute either for corrupt or political reasons.* To this, petitioners would add—even for legitimate reasons where in spite of known corruption national security might be endangered if the Department of Justice carried forward the prosecution but where national security would not be endangered if a citizen-advocate prosecuted such abuses via civil action in the public interest.

It is perhaps in this latter instance that the False Claims Act can be an effective tool against abuse of power by circumventing so-called "gray mail" wherein the corrupt officials threaten to disclose government secrets ir-

relevant to the case when the government brings the action. The Second Circuit decision would foreclose this seemingly worthwhile objective. Presidents arguably should be immunized from civil suits for acts in office performed in a broad interpretation of "good faith" and if there is no body of case law holding their actions to be illegal but there can be no "good faith" in a complicity in a contractor's false claims not even for a President.

Safir's three choices

Judge Friendly in affirming the dismissal of the complaint in Docket 77C-1093 (see appendix p. 79a) stated that petitioner had three choices in the 1960's.

1. He could have instituted a treble damage suit on behalf of himself and his company.

Petitioner in 1966 instituted such an action and this action was examined in the Second Circuit. See *In the Matter of Sapphire S.S. Lines and J. Read Smith Trustee v. Winthrop Stimson Putnam and Roberts*, 509 F.2d 242 (1975). The lack of diligence of trustee's anti-trust counsel Joseph Alioto in pursuing a settlement favorable to the creditors was the subject of critical analysis by the 2nd Circuit panel. When petitioner was forced out of business through this bankruptcy, he lost control of the suit to a trustee and made the "corrupt arrangement" viable. (See appendix pp. 153a-155a, also see article in the Wall Street Journal, February 13, 1979 on the potential for cash liquidity to satisfy "laundered" repayment obligation for Pacific Far East Lines stock (appendix pp. 170a-172a).

The Second Circuit at the time of its decision in Safir I (1969) was informed that petitioner had filed but no longer controlled this treble damage action (see Safir I at page 978, footnote 8).

2. He could "if he had thought of it" have withheld at least some information from the government and brought a *qui tam* action under 31 U.S.C. 231, 232.

Petitioner did just that in Docket 77C-1093 when he disclosed the "corrupt arrangement" after the suit was filed in May, 1977. The lower court which suggested such an option rejected the information (in a low profile footnote appendix p. 22a) as not being germane to the False Claims case and thereby rejected the suit under a more literal reading of 232(c) than *Pettis* or *Rippetoe!!*

3. He could endeavor to force the Maritime Administration to act to recover the subsidy payments and thereby involve the government in the "full expense of the prosecution."

There was no prosecution. There was an investigation and a planned avoidance of prosecution by a non-statutory settlement in utter disregard of "the interest of the victim" set forth in Safir I by the learned Circuit judge who 10 years later would foreclose relief by abandoning this protected interest (Safir I at 978, *ibid.* footnote 7) with a sorrowful pat on the back.

CONCLUSION

For the reasons set forth above Petitioners, United States and Marshall P. Safir pray that this Petition for Certiorari be granted.

Respectfully submitted,

MARSHALL P. SAFIR,
Pro Se

41 Flatbush Avenue,
Brooklyn, N.Y. 11217

Dated: February 23, 1979

IN THE

Supreme Court of the United States

DOCKET NO. 78-1311

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Appendix to Petition for Writ of Certiorari

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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

September 18, 1978

Mr. Marshall P. Safir
41 Flatbush Avenue
Brooklyn, New York 11217

Re: Marshall P. Safir v. Juanita Kreps, Secretary of Commerce, et al.

Marshall P. Safir v. American Export Lines, Inc., et al.

Dear Mr. Safir:

Your applications for extensions of time to file a petition for a writ of certiorari in each of the above cases, received September 14, 1978, are herewith returned.

Under the Rules of this Court, if you have made a timely petition for a rehearing, the ninety days allowed for filing a petition for a writ of certiorari do not begin to run until the rehearing has been acted upon.

After conferring with the Court of Appeals for the Second Circuit, I have found that you have made such a timely petition in these cases, which have not yet been acted upon. As such, an application for an extention of time is presently premature.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By

/s/ Francis J. Lorson
Francis J. Lorson
Deputy Clerk

th
Enc.
cc: Hon. Wade H. McCree, Jr.
Kominers, Fort, Schlefer & Boyer
Kirlin, Campbell & Keating
Foley, Hoag & Elliot
Barrett, Smith, Schapiro & Simon
Shea & Gardner

CORRECTED COPY

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of November, one thousand nine hundred and seventy-eight.

Marshall P. Safir and Sapphire Steamship Lines Inc.,
Plaintiff

Marshall P. Safir, 77-6219
Plaintiff-Appellant, 77-7626

v.

Robert J. Blackwell, Assistant Secretary for Maritime Affairs, United States Department of Commerce, Successor to and Subsitituted for James W. Gulick and Andrew Gibson, etc. et.al.,
Defendants

American Export Isbrandtsen Lines Inc. et. al.,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant pro se, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Irving R. Kaufman
Chief Judge
IRVING R. KAUFMAN

CORRECTED COPY

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of November, one thousand nine hundred and seventy-eight.

Present: HON. HENRY J. FRIENDLY

HON. WILLIAM H. TIMBERS
Circuit Judges

HON. WALTER E. HOFFMAN
District Judge

Marshall P. Safir, and Sapphire Steamship Lines, Inc.,
Plaintiff

Marshall P. Safir,
Plaintiff-Appellant 77-6219
v. 77-7626

Robert J. Blackwell, Assistant Secretary for Maritime Affairs, et.al.
Defendants

American Export Isbrandtsen Lines Inc., et. al.,
Defendants-Appellees.

A petition for a rehearing having been filed herein by the appellant pro se

Upon consideration thereof, it is

Ordered that said petition be and it is hereby DENIED.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MARSHALL P. SAFIR,

Plaintiff-Appellant,

-against-

ROBERT J. BLACKWELL, Assistant Secretary for Maritime Affairs, United States Department of Commerce, et al,

Defendant-Appellees.

and

UNITED STATES OF AMERICA, ex rel. MARSHALL P. SAFIR and MARSHALL P. SAFIR,

Plaintiffs-Appellants,

and

AMERICAN EXPORT LINES, INC., et al,

Defendants-Appellees.

Docket No. 77-6219

77-7626

----------X

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Supplemental Memorandum to Petition for Rehearing en Banc.

MARSHALL P. SAFIR
Pro Se
41 Flatbush Avenue
Brooklyn, N.Y. 11217

Supplemental Memorandum to Petition for Rehearing en Banc.

Petitioner respectfully requests this Court to take judicial notice of the annexed Thirty-Second Report by the Committee on Government Operations, together with Additional Views submitted to the second session of the 95th Congress and transmitted by the Chairman to the Speaker on October 2, 1978.

The report no. 95-1680 on pages one through sixteen set forth the relationships between Assistant Secretaries for Maritime Affairs Gibson (1971) and his successor Blackwell (1972) to the present date in an "outrageous'[1] conflict of interest when they and their General Counsel H. Clayton Cook, Jr. (cf pp. 12-15) sat on the Maritime Subsidy Board concurrently in the hearing mandated by this Circuit in its decisions in Safir I and Safir II while they were initiating the establishment of a trade association. They sat on the Board of Directors of this trade association whose purpose was to protect the interests of ODS contractors and whose predominant members were the named carriers under investigation for the violation of section 810 MMA 1936.

In docket 77-7626, appellant has alleged not only that the claims were false, but also that there was corruption upon the part of

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[1] See views of Rep. Paul McCloskey, pp. 31-34 of the report.

government in dealing with them. This House report bears out this corruptive conflict of interest on the part of the government officers charged with the responsibility by this Circuit to decide whether to seek prosecution.

As stated in U.S. et al. v. Rippetoe et al, 178 F.2d at 736, as follows:

> "...(3) In the second place, we do not think that knowledge on the part of a government official who is implicated in the fraud precludes suit by the informer. The whole history of the provision shows that its ourpose was, not to bar bona fide suits by informers merely because corrupt officials of the government might have participated in the fraud or refused to prosecute it, but to prevent the bringing of parasitical actions by those who sought to profit from governmental investigations or prosecutions by using the evidence which these had developed, as occurred in United States ex rel. Marcus v. Hess, 317 U.S. 537,63 S.Ct. 379,87 L.Ed. 443, the decision in which led directly to the legislation of which the provision here is a part ...". (Emphasis added.)

Contrary to involving the government with the "full expense of the prosecution" (see Petition for Rehearing, Attachment A, Slip opinion, at p. 3674), the mandate of the Second Circuit in Safir II was converted into a defense for the government and industry acting in concert to insure against the requirement of the Department of Commerce to seek prosecution. No moneys were expended in Safir's behalf to the end of his reentry into business by the Department of Commerce in what

the Report terms as "outrageous" and "blatant" conflict of interest. Appellant Safir should not be disqualified and foreclosed from a false claim act remedy when the improper relationship caused the Department of Commerce to share with these violating carriers the full expense not of the prosecution, but of the defense. The cost of the prosecution during the entire period from 1971 to 1974 when the litigation was in the administrative process mandated by this Circuit in Safir I and II, was, on the basis of the revelations in the House Report, alwasy the burden of this petitioner.

Attached hereto is a copy of petitioner's letter to Chief Judge William T. Bryant of the U. S. District Court for the District of Columbia, covering the same subject matter as it pertains to the continuing review action under the Administrative Procedure Act.

Respectfully submitted,

/s/ Marshall P. Safir

Marshall P. Safir
Pro Se,
Petitioner

Dated: October 13th, 1978

MARSHALL P. SAFIR
41 Flatbush Avenue
Brooklyn, N. Y. 11217

October 12th, 1978

The Honorable William P. Bryant
Chief Judge United States District Court
for the District of Columbia
Washington, D. C.

Re: Dockets 74-1474 Safir v. Kreps et al.
74-1788
75-0055

Dear Judge Bryant:

On October 2nd, 1978, the Committee on Government Operations of the House of Representatives submitted to the Speaker its House Report No. 95-1680 Union Calendar No. 908. This report by the Commerce, Consumer and Monetary Affairs Subcommittee is entitled, Report on Problems in the Relationships Between the Commerce Department's Maritime Administration and the National Maritime Council, A Private Trade Organization.

The report contains additional views of Rep. Paul McCloskey, a member of the Committee and also of the House Merchant Marine and Fisheries Committee.

While the report initially was inspired by "grass roots lobbying" aspects of the relationships in 1977 and 1978, the Committee found, as follows:

"(a) The relationships between the Maritime Administration, a subsidy and regulatory agency, and the National Maritime Council, a private trade organization, was a blatantly improper one from its inception in 1971 and demonstrated an utter disregard for conflict-of-interest requirements and considerations."

I am enclosing six copies of the House Report with this letter, Att. I, and hereby request that judicial notice be taken of the adjudicative facts therein as the period during which this illicit liason was countenanced by Secretaries Stans, Peterson, Dent, Richardson and Kreps spans all the years of the Safir litigation and indeed the Assistant Secretaries for Maritime Affairs Andrew Gibson (in 1971) and Robert J. Blackwell, who with their General Counsel H. Clayton Cook (in 1972, 1973) initiated the establishment of this trade association with voting rights for the government members.

These men also sat in judgment and voted for the mitigation theories expanded in the MSB decision in Docket S-243. These formed the basis for the final decision by Secretary Dent in 1974.

The Report, and in particular pages 1 through 16, and the additional view of Representative McCloskey, effectively destroy any facade of impartiality or good faith. Any presumption of the validity of a "mitigation" theory in this case which I addressed in my appeal brief in the Court above on July 17, 1978 (dismissed without prejudice on July 27, 1978) must also be seen in the light of this Report.

Your order of March 29, denying my motion for the Nixon tapes at that time evidenced your need to be convinced by a stronger showing of the bad faith on the part of the government officials responsible for the decision before you would allow supplementation of the record in an "Overton" type hearing. Plaintiff herewith submits that this Report is the "smoking gun".

My brief on appeal from your March decision is now part of the record before you by your fiat of Sept. 9, 1978. I respectfully offer pages 9-14 as sufficient support for the subpoena of the relevant tapes and other discovery documents regarding gift of material value given to these officials by the subsidized carriers which were alluded to in the transcript of the hearing before the Subcommittee.

I have apprised the Second Circuit Court of Appeals of this Report, since as of this date no action has been taken on my Petition for Rehearing en Banc of the False Claims Amendment to the original complaint I filed in 1968 or to the dismissal of the action under 31 USC231,232 that I filed in 1977 in the USDC EDNY Docket 77-1093. I submit herewith as Attachment II my supplemental memorandum to the Second Circuit about House Report No. 95-1680 Union Calendar 908.

Under these circumstances, I request that the pretrial hearing be convened so that a renewed motion for relevant Nixon tapes and other evidence can be heard before this Court. The House Report represents "one of those future events" which would trigger the renewal of such motion and which formed the basis of the United States Court of Appeals for the

District of Columbia's decision per curiam in Safir v. Kreps on July 27th, 1978.

Respectfully yours,

/s/ Marshall P. Safir

Marshall P. Safir
Pro Se

Copies sent to:
Clerk U.S. Court of Appeals for the Second Circuit
J. Franklin Fort, Esq.
T.S.L. Perlman, Esq.
James N. Jacobi, Esq.
Elmer C. Maddy, ESq.
Robert T. Basseches, ESq.
Verne W. Vance, Jr., Esq.
Allen van Emmerick, Esq.
Daniel H. Margolis, Esq.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 770, 840—September Term, 1977.

(Argued May 31, 1978 Decided June 27, 1978.)

Docket Nos. 77-6219, 77-7626

MARSHALL P. SAFIR,

Plaintiff-Appellant,

v.

ROBERT J. BLACKWELL, Assistant Secretary of Commerce, et al.,

Defendants-Appellees.

MARSHALL P. SAFIR,

Plaintiff-Appellant,

v.

AMERICAN EXPORT LINES, INC., et al.,

Defendants-Appellees.

Before:

FRIENDLY and TIMBERS, *Circuit Judges,* and HOFFMAN, *District Judge.**

* Of the District Court for the Eastern District of Virginia, sitting by designation.

Appeals from orders of the District Court for the Eastern District of New York, John F. Dooling, *Judge*. One order denied plaintiff's motion to amend a complaint filed in 1968 against United States government officials to compel them to take action to recover subsidies alleged to have been illegally paid under § 810 of the Merchant Marine Act, 1936, 46 U.S.C. § 1227, see *Safir* v. *Gibson*, 417 F.2d 972 (2 Cir. 1969), *cert. denied*, 400 U.S. 850 (1970), so as to state a claim against the intervening subsidy recipients under the False Claims Act, 31 U.S.C. §§ 231 and 232. The other order dismissed an action brought in 1977 against the subsidy recipients under said Act.

Affirmed

MARSHALL P. SAFIR, Brooklyn, N.Y., *Pro Se*.

GILBERT S. FLEISCHER, Esq., Department of Justice, New York, N.Y. (Barbara Allen Babcock, Assistant Attorney General, and David G. Trager, United States Attorney for the Eastern District of New York, of Counsel), *for Defendants-Appellees Robert J. Blackwell, et al.*

ELMER C. MADDY, Esq., New York, N.Y. (Kirlin, Campbell & Keating, Esqs., *for Defendant-Appellee United States Lines, Inc.*; James N. Jacobi, Esq., and Kurrus, Dyer, Jacobi & Mooers, Esqs., *for Defendant-Appellee American Export Lines, Inc.*; J. Franklin Fort, Esq., T.S.L. Perlman, Esq., William H. Fort, Esq., and Kominers, Fort, Schlefer & Boyer, *for Defendants-Appellees Lykes Bros. Steamship Company, Inc. and Moore-McCormack Lines, Inc.*, of Counsel).

ROBERT T. BASSECHES, Esq., Washington, D.C. (Shea & Gardner, Esqs., Daniel H. Margolis, Esq., Warren L. Lewis, Esq., and Bergson, Borkland, Margolis & Adler, *for Defendants-Appellees American President Lines, Ltd., Prudential Lines, Inc., and PSS Steamship Company, Inc.*; Verne W. Vance, Jr., Esq., Arthur G. Telegen, Esq., and Foley, Hoag & Eliot, Esqs., *for Defendants-Appellees Farrell Lines*; Barrett, Smith, Schapiro, Simon & Armstrong, Esqs., *for Defendants-Appellees American President Lines, Ltd., Prudential Lines, Inc., PSS Steamship Company, Inc., and Farrell Lines, Inc.*, of Counsel.)

FRIENDLY, *Circuit Judge*:

Plaintiff-appellant Marshall P. Safir has been laboring for more than a decade to obtain a recovery for the United States of subsidies alleged to have been illegally paid to members of the Atlantic and Gulf American Flag Berth Operators (AGAFBO). The Federal Maritime Commission (FMC) held, on December 8, 1967, that in 1965 AGAFBO, with the purpose of eliminating Mr. Safir's company, Sapphire Steamship Lines, Inc. (Sapphire), from competing with the conference lines, had promulgated rates for Government cargoes in the North Atlantic trade which were so unreasonably low as to be detrimental to the commerce of the United States, contrary to the public interest, and, in consequence, violative of §§ 15 and 18(b)5 of the Shipping Act, 1916, 46 U.S.C. §§ 814, 817(b)(5). *Rates on U. S. Government Cargoes*, Docket No. 65-13, 11 F.M.C. 263, 287. Safir then requested the appropriate

government officials to recover subsidies allegedly paid illegally to AGAFBO members, on the grounds that these same discriminatorily low rates constituted a violation of § 810, Merchant Marine Act, 1936, 46 U.S.C. § 1227. These efforts proving unsuccessful, he brought a suit in 1968 in the District Court for the Eastern District of New York to prod the officials into action. Safir was rebuffed by the district court, but met with success here. *Safir* v. *Gibson*, 417 F.2d 972 (1969), *cert. denied*, 400 U.S. 850 (1970) (*Safir* I).

However, the Maritime Subsidy Board decided to follow an expensive and time-consuming course which would have required relitigation of the issues of violation already determined by the FMC. When Safir sought the aid of the district court in avoiding such duplicative proceedings, the law officers of the Government opposed him and the district court agreed. Again we took a different view, both when the appeal was first heard with only the Government as appellee, and later when the subsidy recipients, who had previously abstained from participating, *see* 417 F.2d at 976 n. 4, intervened in the action for the purpose of seeking a rehearing. *Safir* v. *Gibson*, 432 F.2d 137, 145 (2 Cir.), *cert. denied*, 400 U.S. 942 (1970) (*Safir* II). Following another resort by Safir to the Eastern District and to this court, this time unsuccessful, see *Safir* v. *Blackwell*, 469 F.2d 1061 (1972), *cert. denied*, 414 U.S. 975 (1973), (*Safir* III), the Maritime Subsidy Board directed in 1973 that a total of $2,388,463.16 should be recovered from five AGAFBO lines that had been in direct competition with Sapphire. *Investigation of Alleged Section 810 Violation*, Maritime Subsidy Board S-243, 14 P&F Shipping Regul. Reptr. 77, 78 (1973). On a discretionary appeal to the Secretary of Commerce pursuant to 46 C.F.R. § 202.1 (¶ 6.01), the latter, by order dated September 9, 1974, re-

duced the amounts to a total of $1,126,522.26. The basis for this slash was what the Court of Appeals for the District of Columbia Circuit has called a "preemptory announcement" by the Secretary that "the record indicates that the United States Government actively induced the rate reductions here in issue," see *Safir* v. *Kreps*, 551 F.2d 447, 455 (D.C. Cir.), *cert. denied*, 46 U.S.L.W. 3215 (1977) (*Safir* IV).[1] When Safir complained to the courts of the inadequacy of the recovery, he was again opposed by the law officers of the Government. He was unsuccessful in the District Court for the District of Columbia, but the Court of Appeals, taking a different view, reversed and remanded with a direction that "the trial court should carefully scrutinize the evidentiary support for the Secretary's ruling and should, if necessary, remand the record to the Secretary for clarification of his reasons for interpreting the evidence as he has." 551 F.2d at 455.

With this frustrating background it is understandable that Safir should have decided the time had come to place the controversy in a posture where he, rather than Government officials, would control the prosecution. The instrument he chose was the "*qui tam*" statute which empowers any person to bring and carry on a suit on behalf of the government against anyone who has presented a claim against the United States for payment or approval, "knowing such claim to be false, fictitious, or fraudulent," 31 U.S.C. §§ 231 and 232.[2] His theory was that the steamship lines had submitted claims for subsidy, knowing that

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1 It should be made clear that the Secretary who directed the reduction was Secretary Dent, not Secretary Kreps.

2 Safir had adverted to possible resort to a *qui tam* action in the 1972 proceedings before both the district court and this court, and had specifically mentioned the possibility of a later False Claims Act claim in an affidavit, see also *Safir* III, *supra*, 469 F.2d at 1063, but had not pursued this.

§ 810 of the Merchant Marine Act, 46 U.S.C. § 1227, and the corresponding clauses in their subsidy contracts made them ineligible for subsidies while they were charging rates which violated § 15 of the Shipping Act. Safir sought to invoke the *qui tam* statute in two ways: First, he filed an action against the steamship companies on May 25, 1977. After Safir had complied with the requirements of 31 U.S.C. § 232(C) with respect to advising the Attorney General of the pending action, the United States declined to enter the suit. Second, he moved to amend his 1968 complaint against government officials in which, as heretofore stated, the steamship lines had later intervened, so as to state a claim under the false claims statute,[3] and moved to consolidate the two actions. The steamship lines opposed the motion for leave to amend the 1968 complaint and moved for summary judgment with respect to the 1977 action. Judge Dooling denied Safir's motion for leave to amend and granted the defendants' motion for summary judgment, and these appeals followed.[4]

The judge stated his reasons for denying leave to amend as follows:

> While, as it would be amended, the complaint would in ultimate substance add a False Claims Act Count, that count does not arise out of the matter of original

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3 The advantage of this course lay in the possibility of "relation back," F. R. Civ. P. 15(c), and consequent avoidance of serious difficulties with respect to the statute of limitations.

4 Defendants have not raised the claim that, as held in *United States v. Quan*, 190 F.2d 1, 6 (8 Cir.), *cert. denied*, 342 U.S. 869 (1951), a litigant cannot prosecute a *qui tam* action under 31 U.S.C. § 232 *pro se*. If we assume that such a claim would be well founded, the remedy would not be outright dismissal but a direction that the action be dismissed unless an attorney is retained. Compare *Phillips v. Tobin*, 548 F.2d 408, 415 (2 Cir. 1976) (stockholder's derivative action). At argument Mr. Safir expressed willingness to retain an attorney if either of the orders were reversed.

> complaint. The original complaint sought to compel public officers to do what plaintiff contended that it was their duty to do. The claim rested on the contrast between the FMC decision that the AGAFBO rates were unjustly discriminatory and the failure of the Maritime Administration, Maritime Subsidy Board, to take appropriate action in the light of 46 U.S.C. § 1227. The new matter would add a completely new claim both as to substantive content and as to the identity of the persons against whom relief was sought. Nothing in the original case turned on the knowing presentation of a false, fictitious or fraudulent claim. There is no basis for authorizing an amendment that would transform the case, in effect dismiss the original defendants, and pursue a completely different claim. *Cf. Rosenberg* v. *Martin*, 2d Cir. 1973, 478 F.2d 520, 526-27; *United States* v. *Templeton*, E.D. Tenn. 1961, 199 F.Supp. 179, 183-84.

We can find no sound basis for disagreeing with this analysis

The grant of summary judgment for the defendants on the 1977 complaint was based on the clause in 31 U.S.C. § 232, added by the Act of December 23, 1943, 57 Stat. 608, which reads:

> The court shall have no jurisdiction to proceed with any [*qui tam*] suit whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought.

The judge concluded that the information which Safir had already furnished to Congressional committees, to the FMC, and to the Maritime Administrator in the course of his

long fight to have AGAFBO's predatory rates declared unlawful and to cause the government officials to recover illegally paid subsidies constituted the very evidence on which the action under the False Claims Act would depend.[5] Thus he had no need to consider the defendants' additional contentions that the 1977 action was time-barred and that their submission of subsidy claims could not be viewed as "false, fictitious or fraudulent" within the meaning of 31 U.S.C. § 231.

It is established that the "whenever it shall be made to appear" defense to a *qui tam* suit being prosecuted by the relator may be made not only by the United States but by a defendant. *United States ex rel. Leslie* v. *Potomac Electric Power Co.*, 208 F.2d 39, 41 (D.C. Cir. 1953); *United States* v. *Pittman*, 151 F.2d 851, 853 (5 Cir. 1945) (dictum), *cert. denied*, 328 U.S. 843 (1946). The leading court of appeals decision construing the clause, *United States and Aloff* v. *Aster*, 275 F.2d 281, 283 (3 Cir.), *cert. denied*, 364 U.S. 894 (1960), gives it a literal reading which supports the ruling by the district judge that knowledge by the government prior to suit bars the action, even if the plaintiff is the source of that knowledge. We, like others, see *United States ex rel. Vance* v. *Westinghouse Electric Corp.*, 363 F.Supp. 1038, 1041-42 (W.D. Pa. 1973); *United States ex rel. Davis* v. *Long's Drugs, Inc.*, 411 F.Supp. 1144, 1150-52 (S.D. Cal. 1976) (dictum), are not

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5 The judge stated that the only new evidence alleged by Safir, excerpts from which were attached to his opinion, "related to a corrupt arrangement to frustrate plaintiff's endeavor to vindicate his claims" by a "deal" and concluded that this "is neither germane to the False Claims Act case nor to the Government's claims under 46 U.S.C. § 1227, nor is it material that was not in the possession of the Government since it professedly came from 'leaks' from the Watergate Special Prosecutor's office." Since we agree that the matter was not germane to the False Claims Act claim, we have no occasion to consider the correctness of the judge's two other propositions.

altogether happy with this approach, which extends the clause considerably beyond the evil sought to be remedied and gives it a broader effect than would be indicated by the legislative history reviewed by Judge Hastie in the district court decision, 176 F.Supp. 208, 209-10 (E.D. Pa. 1959), affirmed in *Aster*, and by Judge Knox in *Vance*, *supra*, 363 F.Supp. at 1041-42. Safir is at an opposite pole from the "mere busybody who copies a Government's indictment as his own complaint and who brings to light no frauds not already disclosed and no injury to the Treasury not already in process of vindication", described in the dissent of Mr. Justice Jackson in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 558 (1943), the case which inspired the 1943 amendments to the *qui tam* statute. Moreover, it seems rather curious that an informer who makes only a partial or merely conclusory disclosure to the United States before filing suit, should be free to carry on a *qui tam* action or to receive an award, 31 U.S.C. § 232(E)(1), if the United States elects to take over the prosecution, whereas the informer who has already furnished complete information should be barred from either. We have wondered whether some argument could be made for the plaintiff on the basis that no one in the Government had entertained any thought of pursuing the steamship companies under 31 U.S.C. § 231 which permits recovery not simply of any subsidies illegally paid but of "the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit." However, this would be true in almost any false claims suit which was not duplicative of one already filed or in course of preparation by the Government. Moreover, such an argument would still confront the obstacle that the false claims suit would be

"based upon evidence or information" already in the possession of the Government, and would have to face our decision in *United States ex rel. Greenberg* v. *Burmah Oil Co.*, 558 F.2d 43, 45-46 (2 Cir.), *cert. denied*, 46 U.S. L.W. 3357 (1977), see also *United States ex rel. Bayarsky* v. *Brooks*, 110 F.Supp. 175, 180 (D.N.J. 1953), *aff'd* 210 F.2d 257 (3 Cir. 1954); *United States ex rel. McCann* v. *Armour & Co.*, 146 F.Supp. 546, 549 (D.D.C. 1956), *aff'd* 254 F.2d 90 (D.C. Cir.), *cert. denied*, 358 U.S. 834 (1958).

While a case may arise when the literalism of *Aster* would be so offensive to the intention of Congress as to demand a more liberal approach, we do not think this to be one. Despite his years of valiant effort, when all is said and done, Mr. Safir had three choices available to him in the late 1960's. He could have instituted a treble damage action on behalf of himself and his company for injury to business or property under the precise terms of § 810 of the Merchant Marine Act, 1936, 46 U.S.C. § 1227; he could, if he had thought of it, have withheld at least some information from the Government and brought a *qui tam* action under 31 U.S.C. §§ 231-232; or he could have done what he did, namely, endeavor to force the Maritime Administrator to take action to recover subsidies illegally paid. Under either of the first two courses, he would have been required to incur the complete burden of the expense of prosecution unless the Government elected to take over the *qui tam* action. Having opted for the third course and thereby involved the Government with the full expense of prosecution, he may not now bring a *qui tam* action on the basis of the same information he has already furnished.

The orders are affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - -X

MARSHALL P. SAFIR,

Plaintiff, :

v. 77 C 1093

AMERICAN EXPORT LINES, :
et al.,

Defendants.

- - - - - - - - - - - - - - - -X

MARSHALL P. SAFIR,

Plaintiff, : 68 C 643

v.

ROBERT W. BLACKWELL, : MEMORANDUM
et al., and
ORDER

Defendants. :

- - - - - - - - - - - - - - - -X

Appearances:

MARSHALL P. SAFIR, pro se

ELMER C. MADDY and KIRLIN CAMPBELL & KEATING, KOMINERS FORT, SCHLEFFER & BOYER, and KURRUS & ASH for American Export Lines, Lykes Bros. S.S. Co. and United States Lines

ROBERT T. BASSECHES and BARRETT,SMITH SCHAPIRO SIMON & ARMSTRONG, BERGSON, BORKLAND, MARGOLIS & ADLER, SHEA & GARDNER and FOLEY, HOAG & ELIOT for American President Lines, Farrell Lines, Prudential Lines, and PSS Steamship Co.

GILBERT S. FLEISHER and DAVID G. TRAGER,
United States Attorney

DOOLING, D.J.

The 1977 action was commenced on May 26, 1977, against the ocean carriers to enforce their alleged liability under 31 U.S.C. § 231 to the United States. The ground of liability asserted is that the carrier defendants, by reason of their participation in a practice discriminatory against Sapphire Steamship Lines, Inc., were not entitled to payment of any construction or operating differential subsidy (46 U.S.C. § 1227) but have nevertheless filed claims for and received payment of such subsidy amounts from the United States, and that those subsidy claims must be held to be false, fictitious or fraudulent. Plaintiff sues in reliance on Clause (B) of 31 U.S.C. § 232; that clause authorizes any person to bring a suite to recover the fraud damages and forfeiture provided in Section 231 "as well for himself as for the United States". Plaintiff has given to the United States the notice required by Section 232 (C), by supplying it with a copy of plaintiff's Petition for a Writ of Certiorari and Appendix in Safir v. Kreps as comprising plaintiff's "disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit." (The petition for writ was one of three addressed to the decision of the Court of Appeals for the District of Columbia

Circuit, reported 551 F.2d 447. The petitions were denied October 3, 1977.) The United States within sixty days thereafter declined in writing to enter the suit, saying that it had concluded from plaintiff's submission that the central issue of plaintiff's allegations in the present 1977 action "is presently being litigated in the United States District Court for the District of Columbia in an action styled" Marshall P. Safir, plaintiff, v. Juanita M. Kreps, et al, defendants, Civil Action No. 74-1474. Plaintiff, then, is free under Section 232(C) to pursue the suit unless there is a defect in the court's authority to proceed, for Section 232(C) provides, in part, that

> "The court shall have no jurisdiction to proceed with any such suit brought under clause (B) of this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought."

Section 235 provides that suits to enforce liability under Section 231

> "...shall be commenced within six years of the commission of the act, and not afterward."

In the period from March 29, 1965, until March 1, 1966, the Atlantic and Gulf American Flag Berth Operators (a "conference") had in effect rates for certain United States military cargoes which the Federal Maritime Commission (FMC) on December 12, 1967, held had been designed for the sole purpose of eliminating Sapphire Steamship from the carriage of military cargo by unfair competition; these rates the FMC characterized as so unreasonably low as to be detrimental to the commerce of the United States, contrary to the public interest, and, in consequence, violative of 46 U.S.C. § 814.* Counsel for plaintiff and Sapphire promptly drew the attention of the Federal Maritime Administration, Maritime Subsidy Board to the FMC decision and to the provisions of 46 U.S.C. § 1227, and demanded that action be taken to recover all subsidy payments made after March 29, 1965, and to cease making subsidy payments currently. No action having been taken by the Maritime Administration plaintiff, Sapphire Steamship Lines and Arnold Weissberger commenced an action in the Eastern District of New York , 68 C 643, on June 24, 1968, to compel the Maritime Administration, Maritime Subsidy Board and the Secretary of Commerce to cease making

*The decision was not appealed.

subsidy payments to AGAFBO members and to initiate suits to recover from them subsidy payments therefore made. The district court dismissed the complaint, but on appeal the Court of Appeals held that the Maritime Administrator could not refuse to proceed against the AGAFBO members without at least considering the interest of the victim and was at least required to make a considered decision whether to recover the subsidies paid in the past, and that plaintiff had standing to question the Administrator's failure to seek recovery of the subsidies paid during the period of violation. Safir v. Gibson, 2d Cir. 1969, 417 F.2d 972 (Safir I). A second appeal settled that, although current subsidies to the AGAFBO members would not be enjoined in the absence of a showing of violation of 46 U.S.C. §§ 814, 1227, the Maritime Administration was not to redetermine the issue whether the AGAFBO carriers' concerted action in reducing their rates to an unreasonably low level and holding them there for eleven months was unjustly discriminatory or unfair to Sapphire but was to give the FMC's determination the effect of collateral estoppel; the court noted that the Maritime Administration could investigate the nature and extent of individual carriers' participation in the illegal action if it found that relevant to its ultimate decision on whether to seek recovery of subsidies paid during the violation, and, if so, how much and from whom. Safir v. Gibson, 2d Cir. 1970, 432 F.2d 137 (Safir II).

The Maritime Administration, Maritime Subsidy Board, conducted a proceeding (No.S-243) before its Chief Hearing Examiner and a Recommended Decision rendered on April 24, 1972, would have fixed liabilities as follows:

American Export Isbrandtsen Lines	169,000.
Moore-McCormack Lines, Inc.	1,135,000.
United States Lines, Inc.	3,452,000.

Plaintiff was dissatisfied with the decision, and after an unrelated injunction matter had been disposed of (2d Cir. 1972, 469 F.2d 1061), the Maritime Subsidy Board of decisions of April 9 and October 10, 1973, fixed the liabilities at the following amounts.

American Export	$ 38,050.25
Bloomfield	121,893.67
Lykes	762,891.99
Mormac	386,776.56
United States Lines	1,061,704.76

Plaintiff sought to review the April 1973 decision of the Maritime Subsidy Board in the Court of Appeals for the Second Circuit, but by order of May 16, 1973, the application was denied. An appeal by the carriers to the Secretary of Commerce resulted in an order of September 9, 1974, adjusting the liability amounts "to reflect the effect of the United States Government action" in actively inducing the rate reductions in issue to its substantial financial benefit. The adjusted liabilities were:

American Export	$ 18,160.82
Bloomfield	46,346.54
Lykes	381,446.00
Mormac	193,276.76
United States Lines	487,292.14

Plaintiff sought review of the liability determinations in the United States District Court for the District of Columbia; that action was dismissed but, on appeal to the Court of Appeals for the District of Columbia Circuit, the dismissal was reversed and the case remanded to the District Court to try the issues, which the Court of Appeals outlined as including the propriety of the administrative action in mitigating the penalties assessed and reducing the subsidy recovery to reflect the proportion of military cargo carried "by the predatory lines", and as extending to the arbitrariness of the precise action taken, determining whether the various factors other than those cited as justifying mitigation can properly be considered and whether in light of all factors appropriate for consideration, the administrative action was arbitrary, capricious, or an abuse of discretion on all the facts developed in the hearing before the Administrative Law Judge (Chief Hearing Examiner); the Court of Appeals left determination of the applicable standards of review qualifiedly open for the district court to determine on remand, but indicated the view that the Secretary's decision to mitigate on the basis he expressed appeared to reflect a failure to come to

grips with the difficulties in the evidence in the record, gave little assurance that his order resulted from a reasoned decisionmaking and might, upon the District Court's scrutiny of the record, show the necessity of a remand to the Secretary for a clarification of reasons. Safir v. Kreps, D.C.Cir. 1977, 551 F.2d 447.

1. Plaintiff moved on September 13, 1977, to amend the complaint in 68 C 643, which, as noted, sought to compel the Federal Maritime Administration, Maritime Subsidy Board, to stop paying subsidies to AGAFBO members and to recover from them any subsidies paid to them after March 25, 1965. The amendment would add a claim under 31 U.S.C. §§ 231 et seq., alleging, in addition to the earlier allegations of violations of 46 U.S.C. §§ 814, 817(b)(5) and 1227, and of consequent liability by virtue of 46 U.S.C.§1227 to refund past subsidies to the United States,

> that during the eleven months period of violation the carriers received over $227,000,000 of subsidies that in May 1971 after defendants were advised that a prima facie case of violation of Section 1227 had been made out, defendants continued to submit vouchers supporting claims for subsidies allocable to the eleven month period of violation knowing them to be false in that defendants, to their knowledge,

> were not entitled to subsidy payments while in violation of the provision of their subsidy agreements by which they agreed not to be parties to any agreement among carriers which is unjustly discriminatory or unfair to another American flag carrier, and defendants signed and submitted affidavits in support of their vouchers stating that they had fully complied with the subsidy agreement and regulations and were entitled to the payments requested, and submitted annual accountings asserting that they had complied with the terms of the subsidy agreement knowing that they had not done so.

Plaintiff argues that the amendment is proper and should relate back to the date the action was filed. Under Rule 15(a) plaintiff may amend only by leave of court, a leave that is to be freely granted when justice so requires; where amendment is allowable, the claim asserted relates back to the date of the original pleading provided that

> "... the claim ... arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading ..."

There is no reason to allow this closed case to be revived by amendment. The original complaint made no claim against any of the defendants. It did, however, clearly pray an adjudication that the making of any subsidy payments to the AGAFBO carriers during the violation months was illegal under 46 U.S.C. § 1227, that continuing subsidy payments to the AGAFBO carriers should be forbidden, and that the public officer defendants should be directed to sue the AGAFBO members to recover the subsidy payments illegally made to them. However, the AGAFBO parties intervened some time before June 18, 1970, after the decision of the Court of Appeals in Safir II, in order to petition for a rehearing (432 F.2d at 145), and after that date were heard in the further district court proceedings in 68 C 643. Plaintiff raised in the case as well as before the Chief Hearing Examiner his point that the United States should recover all the subsidies, and that, on some basis, he should participate in or benefit by the recovery, and in connection with plaintiff's motion by order to show cause of May 4, 1972, and the related appeal, there was discussion during oral argument on May 31, 1972, of plaintiff's possible qui tam interest and reference was made to the "False Claims Act" (31 U.S.C. §§ 2311 et seq.) in the context of Connecticut Action Now, Inc. v. Roberts Plating Co., Inc., 2d Cir. 1972, 457 F.2d 81; plaintiff's affidavit of August 21, 1972, submitted in the Court of Appeals plaintiff, asserted that he had been

actively concerned that the public officials take proper safeguards to protect the interest of the United States

> "... and his (plaintiff's) own in later action under 31 U.S.C. Sec. 231, 232, 233 & 235 after extent of these recovered are decided on."

Plaintiff presented, as an issue for the Court of Appeals to decide, the question of his "statutory interest under 31 U.S.C. Sec. 231-233, 235 in any forfeiture mandated by the violation of 46 U.S.C. Sec. 1227, Sec. 810 by the offending ocean carriers as Sec. 819 has been interpreted by (the Court of Appeals) decisions in Safir v. Gibson". Plaintiff argued in the affidavit, after quoting language from the brief before the Chief Hearing Examiner concerning the AGAFBO carriers' making the offending rate agreement despite the Section 810 compliance clause in the subsidy contracts, that

> "The deceit is obvious. The respondents unlawful behavior during that period violated both a clear provision in the subsidy agreement as well as an explicit statute and in presenting their claims for subsidy payments corresponding to that period the respondents received government monies to which they were not entitled.

> Moreover, in presenting the claims, the respondents were holding out that the provisions of Sec. 810 which are incorporated in the subsidy agreement had been complied with, in effect misrepresenting their compliance with its terms. Appellant in fact far exceeds the requirements of the doctrine in Marcus ... to justify his qui tam interest."

On this point, the Court of Appeals was clear (469 F.2d at 1063):

> "Plaintiff complains of a statement by the district judge that he would have no interest in any recovery by the Government. This statement was unnecessary to the decision and we have no occasion either to approve or to disapprove it."

The statement complained of was

> "Plaintiff argues that he may have an individual right to participate in any ultimate recovery by the Government under qui tam legislation. No statute authorizing a qui tam recovery or qui tam proceedings has been pointed to and the decision in Connecticut Action Now, Inc. v. Roberts Plating Company, Inc. ... makes it reasonably clear that the plaintiff has no qui tam interest in the Government's recovery

under Section 810 of the Merchant Marine Act, 1936 as amended (46 U.S.C. § 1227)."

The motion to amend the complaint in 68 C 643 and to consolidate that action with 77 C 1093 must be denied. While, as it would be amended, the complaint would in ultimate substance add a False Claims Act Count, that count does not arise out of the matter of original complaint. The original complaint sought to compel public officers to do what plaintiff contended that it was their duty to do. The claim rested on the contrast between the FMC decision that the AGAFBO rates were unjustly discriminatory and the failure of the Maritime Administration, Maritime Subsidy Board, to take appropriate action in the light of 46 U.S.C. § 1227. The new matter would add a completely new claim both as to substantive content and as to the identity of the persons against whom relief was sought. Nothing in the original case turned on the knowing presentation of a false, fictitious or fraudulent claim. There is no basis for authorizing an amendment that would transform the case, in effect dismiss the original defendants, and pursue a completely different claim. Cf. Rosenberg v. Martin, 2d Cir. 1973, 478 F.2d 520, 526-527; United States v. Templeton, E.D. Tenn. 1961, 199 F.Supp. 179, 183-184.

2. By motions for summary judgment defendants challenge the False Claims Act complaint of 77 C 1093 on its merits.

Plaintiff's testimony was taken on September 28, 1977, with a view to determining what evidence or information he had communicated to the United States that was not already in its possession at the time of suit. He testified that he made available to the Government through the Maritime Administration Public Counsel in 1971 all the information that he then had to support the False Claims Act suit, 77 C 1093, and that he had not transmitted or offered any Government representative any new information since that time, none having been requested of him. Plaintiff said he did have information to bring forward at the present time, based on the fact that the case, 77 C 1093, had been filed. Annex A sets forth the relevant parts of the testimony that he then gave about the content of the new disclosures to him. The new material, related to a corrupt arrangement to frustrate plaintiff's endeavor to vindicate his claims, is neither germane to the Flase Claims Act case nor to the Government's claims under 46 U.S.C. § 1227, nor is it material that was not in the possession of the Government since it professedly came from "leaks" from the Watergate Special Prosecutor's office.

It is unanswerably clear that the Government had in its possession all the evidence and information upon which plaintiff's False Claims Act suit is based at the time such suit was brought. Within ten days after the offending rates were put in effect plaintiff made a twelve page statement to the Joint Economic Committee, Subcommittee on Federal Procurement and Regulation, in the course of its hearing on Discriminatory Ocean Freight Rates and Balance of Payments, describing in considerable detail, under the questioning of Senator Douglas, the AGAFBO "fighting rates" adopted "in an effort to drive non-AGAFBO members out of business." Specific reference was made to the fact that certain AGAFBO carriers were subsidized and Sapphire was not; the subcommittee was advised that "the Managing Director has been in touch with Sapphire on the matter and is attempting to collect data on this rate with a view toward possible investigation of it." In a May 1966 communication to the same sub-committee plaintiff asserted that "American subsidized lines should be denied sub- sidy on that portion of their cargoes for which no foreign flag competition exists." In March 1971 plaintiff presented to the Merchant Marine Subcommittee considering S.1220 (a bill that would have authorized certain appropriations) that it should not authorize appropriations to be disbursed without the considered decision mandated by the decisions of the Court of Appeals for the Second Circuit and provoked Senator Hatfield to inquire

whether it would not be more appropriate to bring court action on the question of the disbursement of the funds.

These disclosures, to which must be added those incident to the proceedings before the Maritime Subsidy Board, the present district court, the Courts of Appeals of the Second and of the District of Columbia Circuits and the United States District Court for the District of Columbia, and the material underlying the original Federal Maritime Commission decision on the rates, presented to the Government all the information and evidence bearing on the issues save for the matter of directing the Government to the contention that for the AGAFBO members to have filed claims for subsidy payments while they were operating in violation of Section 810 (46 U.S.C. § 1227) or in respect of the period during which they were operating in violation of the section was arguably to have filed claims "knowing such claim(s) to be false, fictitious or fradulent" or claims which were supported by vouchers known "to contain any fradulent or fictitious statement or entry." But even that very contention was laid before the Government with explicit reference to the False Claims Act in the August 21, 1972, affidavit in the Court of Appeals.

The Government, then, was on May 26, 1977, when suit was started, in possession of the evidence and information upon which the suit is based. It is equally probable that a great deal of the information and evidence possessed by the Government, and much of the impetus to action, derived from plaintiff.

That plaintiff is the source of a substantial part of the evidence and information that was in the Government's possession does not authorize continuance of the action. United States and Aloff v. Aster, 3rd Cir. 1960, 275 F.2d 281, affirming Judge Hastie's decision, E.D.Pa. 1959, 176 F. Supp. 208, make clear that Section 232 prohibits "any qui tam action based on information already in the possession of the United States, regardless of the source from which that information has come." The present case, one in which plaintiff in substance directs the Government's attention to its possible rights under Section 231 as applied to the facts brought out in the Federal Maritime Commission and the Maritime Subsidy Board proceedings, resembles United States v. Armour & Co., D.C. 1956, 146 F. Supp. 546, aff'd, D.C. Cir. 1958, 254 F.2d 90. The Aster case was followed in United States ex rel. Vance v. Westinghouse Electric Corp., W.D.Pa. 1973, 363 F.Supp. 1038, 1042, with an intimation of reluctance. United States ex rel. Davis v. Long's Drugs, inc., S.D. Cal. 1976, 411 F.Supp. 1144, held that Medicaid

claims presented to the states were within the False Claims Act, but that the facts in the possession of the state in question should not be considered facts in the possession of the United States for Section 232 (C) purposes. However, the court in Long's Drugs expressed "serious reservations" about the validity of Aster. The court considered that the clause in Section 232(C) was intended to deny the right to sue only to parasitical suitors who had derived their facts from the public record of the Government's own investigations and was not meant to exclude those who voluntarily furnished information to the Government before starting suit upon the Government's failure to do so. That, the court considered, flowed from the liberal interpretation of the Act adopted in United States v. Neifert-White Co., 1968, 390 U. S. 228. But Neifert-White was liberal in reading the statute as embracing a wide range of Government interests, and throws no light on the Court's attitude toward the clause in Section 232(C). And the statute itself answers the serious reservation of Long's Drugs about the validity of Aster. Under Section 232(E)(2) if the United States rejects the suit and the plaintiff presses it to a conclusion, the plaintiff may receive up to one-fourth of the recovery as "fair and reasonable compensation ... for the collection of any forfeiture and damages", plus the reasonable costs and expenses of suit. If the United States comes in and takes the suit over, however, then

under Section 232(E)(1) the court may award the original suitor "an amount which in the judgment of the court is fair and reasonable compensation to such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought." The award may not exceed one-tenth of the recovery. These provisions have taken the place of the older provision, Section 6 of the Act of March 2, 1763,2 Stat. 698, (Revised Statutes § 3493) which gave the private suitor one-half the damages and forfeitures that he should "recover and collect" as well as the costs of the suit. The older statute gave the United States neither a right to notice of the suit's pendency, nor a right of intervention in it; its sole right was to one-half the recovery and the power to veto a withdrawal or discontinuance of the suit. See Bush v. United States, C.C. Oreg. 1882, 13 Fed. 625, 629; United States v. Griswold, D.Oreg., 1885, 24 Fed. 361,366, aff'd, C.C.Oreg. 1887, 30 Fed. 762. In United States ex rel. Marcus v. Hess, 1943, 317 U.S. 537, the United States appeared only as amicus curiae, at the request of the Court (317 U.S. at 545). Under the present statue the United States is given control of the suit at its option, and it may altogether exclude the private suitor from participation in the conduct of the case. The emphasis is on limiting the informer's award precisely to what he adds to the store of information and evidence that was in the Government's possession when the suit was started.

That the private suitor, in the pursuit of his own interest and to secure a relief that he could obtain only through the Government, may have disclosed facts and evidence to the Government that arguably might also arm it to pursue a Section 231 claim against the defendants, does not create an exception to the provisions of Section 232(C), no in principle should it. Plaintiff's submissions of evidence to the Federal Maritime Commission, to the Maritime Subsidy Board and to the Senate Subcommittees were directed to specific substantive reliefs to which plaintiff claimed entitlement for Sapphire and for himself by reason of his interest in Sapphire and its business. But the submissions were thereafter in the Government's possession for all purposes, including its determining from them the measure of its own rights, and what relief it would seek in its own considered judgment.

Since so much of Section 232(C) as deals with the effect of the Government's prior possession of the evidence and information on which the suit is based is treated as strictly jurisdictional, United States (by Greenberg) v. The Burmah Oil Co. Ltd., 2d Cir. 1977, 558 F. 2d 43, 46, it follows that the action must be dismissed. In the circumstances it would not be proper to pass on the questions of fraud and of limitations presented by defendants.

It is

ORDERED that the motions of defendants for summary judgment in 77 C 1093 are granted, and the motion of plaintiff to amend the complaint in 68 C 643 and to consolidate that action with 77 C 1093 is denied; and it is further

ORDERED that the Clerk enter judgment that plaintiff take nothing in 77 C 1093 and that the action is dismissed for want of jurisdiction.

Brooklyn, New York

December 20, 1977. /s/ D.J. Dooling
U. S. D. J.

A N N E X A

employee or representative of the government?

A I have offered it. It has not been requested of me.

Q Will you tell us what you have offered to them?

A Well, I haven't offered anything specific to them. I have information which now based on the fact that this case is filed will be brought forward.

Q I now ask you to give us the information which you intend to bring forward.

A Well, upon information and belief, at some time in 1968 an arrangement was made between members of this group and the then Republican Party for the consideration of a considerable sum of money, to see to it that the subsidies which formed the basis of a complaint filed in 1968, in June that that case, if the Republican Party was elected to office, would be made difficult for the plaintiff to succeed.

Q May I ask you whether you have any documents to support this arrangement that the Republican Party had?

A I have no documents, but I have -- that my information came from -- I will put it this way. It came in 1973, about October of 1973, by a telephone call from a newspaper reporter who asked me whether I knew anything about a deal involving approximately $7,000,000 in which --

and he mentioned by name one Spyros Skouras, Senior, had through someone in the Republican Party -- and I am not sure whether it was Mr. Stans that he mentioned by name or not -- had arranged for this $7,000,000 to be paid over, over a period of time, to parties within the Republican Party for the purpose of settling or disposing of the antitrust case which was then filed by the Trustee in Bankruptcy of Safir Steamship Lines, and also my case, which at that time was in the nature of mandamus and which was the original action that I filed in 1968.

Q Could you tell me the name of the newspaper reporter?

A The name of the newspaper reporter was -- his name was Louis Kohlmeyer, and I understand that he is a Pulitzer prize winning reporter who worked for the Wall Street Journal at the time I first knew him, and at the time he called to inquire about my information, about this information, was working for the Chicago Sun Times syndicate in Washington.

I told him at that time that like a husband whose wife was cheating, I would be the last to know the answer to his question, as to whether I had any information on the subject. My answer to him was no, but from that point on I knew that there would be a point in this

litigation when under a False Claims Act amendment, in one case or in a new case filed as this one is here, that we are here today, filed last May, that new information would be supplied to the government in order to firm up the specific intent to defraud, which I felt as far as my case was concerned, this form of contribution would represent.

Q You say this inquiry was in 1973?

A Yes, sir.

Q Did you ever tell anyone in the government about the inquiry?

A No.

Q Why didn't you tell them?

A Because at that time I had no proof, and I had no basis on which to act, except and distinct from perhaps a Special Prosecutor's office and others who were interested at that time.

Mr. Kohlmeyer mentioned, however, if this will be helpful to you, Mr. Fort, and it might be, that certain of this information that he was basing his call to me on was based on leaks from the Special Prosecutor's investigation in the Nixon impeachment case. Make the most of it.

Q So that what you are saying is that the

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information in essence was in the possession of the government at the time he called you, because he had heard about it through leaks from the Special Prosecutor?

A If you think so. As I said, make the most of it. I don't think so. I don't think that that could be considered in the hands of the Attorney General, Department of Justice, since they were not involved in the Special Prosecutor's office.

Q Were any other companies mentioned by this reporter?

A Not by name.

Q Now, return to the affidavit, Mr. Safir.

A Yes.

Q Paragraph 5, Page 7.

A I seem to have a problem there, Mr. Fort. Paragraph 5?

Q Five begins on Page 6 and it goes on to Page 7.

A I beg your pardon. Go right ahead, sir.

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Q I would like to read you a sentence from that paragraph, starting off with "Thus, the conduct and transactions which were in issue before the Maritime Subsidy Board, as a result of the 1968 complaint and are now res judicata, are the same as which formed the basis for the proposed amended complaint."

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I did, and there was no answer and then he called me back at home.

Q Mr. Kohlmeyer?

A Yes. Now, I think I tried to get him back at the Wall Street Journal, but he wasn't there and then he called me and he told me that he was no longer with the Journal, but with the Sun Times Syndicate.

Q Do you remember what time of day you were called by Mr. Kohlmeyer?

A I think it was late afternoon.

Q Where was your office at this time?

A No, he called me back at home.

Q What office did he call?

A He called the office at 41 Flatbush Avenue, Brooklyn.

Q And where were you living at that time?

A I was living in 8 Southview Lane in Kingspoint, New York. So there was a relay of calls from my office to my home.

Q What are you using to place -- what information are you using to place the date of the call some time in September or October of 1973?

A My own memory. Just my recall because of the nature of what was going on at that time, the events

of the time and the timing of his statement that leaks are coming out of the Watergate Hearings and he went further, he went further on this thing, I haven't told you all that he told me.

Q Before we get into the actual conversation, I am just going for information that -- the information which you base your memory of the date of the conversation.

A I did not quite finish that question. I based it on the fact that the Watergate Hearings were on, that as a special prosecutor -- no, I wasn't even sure of that, that the Maritime, the head of the Maritime Commission had been called by the Watergate Committee.

He said at that time or a few days prior to that, Helen Bentley by name had been called by the Watergate Committee, so I placed the timing to be more accurate, perhaps others can too, to place it about the time that she was called before the Watergate Hearings.

Q So the conversation was after she had testified?

A After she testified and certain newspaper type leaks had emanated.

Q How did the conversation begin, who spoke first?

A He did. He said, do you remember me, I

said, of course I remember you.

Q Could you give us the rest of the conversation as you remember it?

A Then he started to ask me questions. In fact, he said, have you felt that you are having a very difficult time in making progress on your case and I said, I sure have felt it.

Q What was your understanding of what he meant by your case?

A The case that I was pursuing in the Maritime Subsidy Board, S 243, which was the outcome of my initial action in 68 C 643 in the Eastern District of New York.

Q He asked you a question and you responded. Was that your only response to the question?

A Yes. I said, why do you ask. That was my next question.

Q What was his response?

A He said, well, we are getting words and I am quoting now on the basis of a conversation of six years ago, so there is some license or liberty involved.

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Q Is it six years or four years ago?

A Excuse me, '73 is four years ago. I was thinking of the first one. Anyway, in connection with the one of four years ago, I asked him, why do you ask

and he said, because there are cer- tain things emanating from the Watergate Hearings that show a relationship between your case and certain things that have happened in regard to campaign contributions and things like that.

He said, do you know of a payoff to Nixon at that time, he said, in the neighborhood of five and a half million dollars. I said, unheard of and I said, I would be the last to know if that were the case, because I mentioned in connection with being like a cuckolded husband, always being the last to know.

He said, did I see any relationship between the City of Baltimore and the problems I was having. I said, no. I said, why do you bring that up. He said, well, isn't it interesting to you that Andrew Gibson and Helen Bentley and also the Vice President of the United States comes from Baltimore.

I said, well, I cannot see what the relationship is. He said, well, there is evidence involved which we are hearing about that connects a payoff of this five and a half million dollars on your case, to the relationship of Andrew Gibson, who was a vice president of Prudential Grace Lines, and an employee of Skouras coming into the administration as the Maritime Administrator. A relationship between Helen Bentley,

a Baltimore reporter, becoming the head of the Federal Maritime Commission and the vice president.

So, I said, I still cannot see the relationship between the vice president and these people. He said, well, Skouras is a Greek. I said, that is right, or Greek extraction. He said, well, we hear it down here and this is what he said, that for the money that he paid into the Nixon administration to buy your case and the problems that you are having, he additionally recommended to Nixon at the time that he would like if his Greek-American compatriot becomes the vice president of the United States for the same five and a half million dollars.

I said, I find that very hard to believe, but that is a lot and if the next time I am in Washington, I will be very glad to discuss this thing further and I did. I came down to Washington soon thereafter. I came down, I called him up and I met him in his office at this National Press Building.

Q Are we going onto another conversation?

A Yes. We are going onto another conversation.

Q All right. Let's go back to the telephone call to you. Did Mr. Kohlmeyer tell you where he had gotten this information?

A No, he did not.

Q Did he indicate that he had gotten it from the testimony at the hearings?

A No, he did not. He indicated that it came in the form of a leak.

Q From --

A From one of the bureaus, apparently some agency, apparently the special prosecutor or the Ervin Committe at the time. I don't know, but it was a kind of a leak thing that he was trying to check out, as to whether I knew anything about it.

Q You mentioned that he was using the pronoun, we have gotten this information.

Do you know if he was working with anyone else in this investigation?

A I don't know.

Q Did he mention any other reporter's name?

A He did not.

Q Did he tell you when Mr. Skouras had been in contact with Mr. Nixon?

A He did not.

Q Did he mention any dates --

A Well, there is a determining factor in that, because Mr. Skouras died soon after Nixon came

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magnificant sum out in order to presumably settle the antitrust case, and see to it that the subsidies not be withheld from the lines, from the steamship lines, who were then receiving them and who were apparently guilty of the violation.

Q Have you had any contacts with Mr. Kohlmeyer since your October or September, 1973 telephone conversation?

A Yes. I mentioned the fact that I visited with him a month or two or three thereafter.

Q Do you remember if it was in 1973 or 1974?

A It might have been in early '74. I told him, I told you that he had an office, he was in this little office all by himself in that building.

Q What building is that?

A National Press Building. Apparently he was a pipe smoker, because the room smelled like a gas bin. You could not breathe in it.

I said, look, I am prepared to cooperate and help you on this thing, if you want some help. I am surprised that you hadn't gotten back to me earlier.

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He had nothing much to say. He looked like he was unhappy with the whole conversation, and perhaps he shouldn't have called me in the first place.

So at that point I decided that was the end

of it, at least for then, and I certainly -- I had nothing further to go on. Everybody and his brother was investigating everybody else at that particular time, and I had my own problems, most of which were based on the ongoing fight with you people.

So I did nothing further about it.

Q Had you initiated this meeting?

A The second meeting, yes, it was me.

Q And do you remember what Mr. Kohlmeyer said?

A He said he would think about going further with it, and that he would get in touch with me, which he never did.

Q Did he ask you any additional questions?

A Not a one.

Q Did he give you any additional information?

A I don't recall.

Q Did he give you any documents?

A No.

Q Do you remember him giving you any more details or mentioning any names?

A I said no. He was reluctant to, from being practically garrulous in the telephone conversation, he was very reluctant to do any talking on that visit.

Q Do you remember how long this second meeting

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

SAFIR,

Plaintiff, :

-against- : 77-C-1093

AMERICAN EXPORT LINES, :

Defendant. :

----------x

----------x

SAFIR,

Plaintiff, :

-against- : 68-C-643

BLACKWELL, :

Defendant. :

----------x

United States Courthouse
Brooklyn, New York

October 28, 1977
5:00 o'clock P.M.

B e f o r e :

HONORABLE JOHN F. DOOLING, JR., U.S.D.J.

PERRY AUERBACH
ACTING OFFICIAL COURT REPORTER

p. 2.

Appearances:

MR. MARSHALL SAFIR, PRO SE

GILBERT FLEISCHER, ESQ.
U. S. Government

ELMER MADDY, ESQ.
Attorney for Trade-Line Defendants

ROBERT T. BASSECHES, ESQ.
Attorney for Non-Trade-Line
Defendants, et al.

P. 33

would hope that if, as I hope in the case you rule in our favor, that that would be dispositive of that element of the case as well. Thank you, your Honor.

MR. SAFIR: Your Honor, in Paragraph 11 of Trade Defendant's statement of material facts as to which there could be no issue --

THE COURT: Trade Defendants?

MR. SAFIR: Trade, and I'll say non-trade as well -- (Pause.) All the trade defendants

THE COURT: I have a separate stating.

MR. SAFIR: Let's take the trade first.

In Paragraph 11 of the Trade Defendant's statement of material facts, as to which there could be no issue, there is a misstatement of facts, of paramount significance. This affiant never admitted that the subject matter of the Colemire conversations is improbable in its judgment. What the transcript states, Page 40, Line 13 is as follows: "I felt the whole conversation --

THE COURT: Let me turn to it.

(Pause.) All right.

MR. SAFIR: "I felt the whole conversation at the time was bizarre anyway, and it was highly improbable. It still does."

34-35

A re-hearing of the tape made during the deposition further clarifies the sentence, wherein I clearly stated that it "sounded highly improbable." Not that it was highly improbable.

I have a copy of the tape with me, your Honor, and as it happens it fits this little machine here, so that I could leave it with the Court rather than try to figure out the exact point in the tape where this comes forward. But on oath, the word "sounded" is in there. In other words, the purpose of bringing this to the Court's attention is to inform the Court that I believe that the Colemire information was factual. I believe that the Defendants entered into an agreement with Richard Nixon and certain officials of his campaign in 1968 prior to the election; that in the event of an election Nixon would, for the gross contribiton of 7 million dollars, protect and defend the interests of the subsidized line defendants, the first by protecting the lines from jeopardy of a 250 million dollar subsidy recovery; and second, by ordering the Justice Department to agree to a settlement of the case of Safir Steamship Lines versus AGAFBO, for the Government creditors' obligations alone, and that was the sum of approximately 1 million 600 thousand dollars. Whether the remainder of the 7 million dollars would go to the campaign coffers of the 1972 election or be siphoned off for other purposes is not yet known. That the Court of Appeals decision, and this I believe, too, in Safir-1, the 1969 decision, seriously compromised the original plan that these people had; and

Safir-2, which was the one where the collateral estoppel effect was decided by the Court, further impaired that scheme's viability. That when the procurium decision in Safir--we'll call Safir-2a took place, this opened the door to investigation of quote, and this was the quote in the decision, "that the Government had a right to determination in S-243 whether a wider conspiracy existed."

But this was used by the Nixon Administration through Secretary Stans in the Department of Commerce for a multi-year delay in the investigation to protect these lines from the finding of violation, and to protect the ability of the lines to accrue the 5.6 million dollar obligations that they took on with Nixon by their continued collection of Government subsidy payments;

That when the anti-trust -- Safir Antitrust Case as a result of the Second Circuit's decision in Safir's 2 and 2a, the creditors of the bankrupt opposed the million six settlement offer which would have denied any recovery to them. The Department of Justice reduced, and this was -- this is in the record -- to $795 thousand dollars, the amount that would be acceptable to the creditor, United States, if the creditors, the Trade creditors would settle for a new offer which would give all creditors and the trustees and -- as counsel -- the sum of two million four. The referee accepted this proposal, the second prop[redacted], and it was approved by the District Court of the District of Columbia in the antitrust case.

The Department of Justice since Nixon's resignation disowned the Nixon Administration agreement to reduce its claim. The 2.4 million settlement leaves open the question of the collection and disposal of the remaining 4.6 million dollar payoff, since the 2.4 million dollars is undoubtedly traceable, to appropriate entries on the books of these defendants. It is in the area of this remaining fund that investigation and discovery will be helpful in '77 C 1093.

MR. SAFIR: (continuing) Now that the recent Supreme Court decision on the Nixon tapes for civil actions becomes -- I'll put it this way -- the recent decision makes the ability to get --

THE COURT: Makes them available.

MR. SAFIR: Makes them available. This is a significant development. Plaintiffs contend in passing that Nixon lived down (up to) his obligation to these defendants as long as he was in office. It was not until after Nixon resigned in August 1974 that on September 5, 1974, just a month later, the Secretary of Commerce, then Dent by name, was free to file his order confirming the violation itself. Even then, the order was tainted by the unsupported charge that Federal officials of the Department of Defense induced the illegal action to attempt to apply the doctrine of collateral estoppel -- excuse me, not the doctrine of collateral estoppel -- the doctrine of estoppel to the Government's recovery under Section 810, or alternatively under the False Claims Act, and handicapped the Department of Justice under a new administration from providing, under the False Claims

Act, the ability to pursue False Claims action, because the Government's hands were not clean.

By the way, this last approach that took place in the order of the Secretary in 1974, that the blaming the Department of Defense officials in 1965, was rejected by Judge Wright in his decision last February. Therefore, either on a denial of the defendant's motion for summary judgment or on a grant of a continuance to this plaintiff to complete his basic discovery prior to taking on, on your part, the decision on the motion for summary judgment, I'll require several subpoenas:

A subpoena to the General Service Administration for those Nixon tapes during the period, May 15th to June 15th, 1969; the time at or about the first Safir decision in the Court of Appeals, wherein, to be specific, the name S-A-P-P-H-I-R-E or Sapphire, my name, or William Sapphire, my borhter's name or Skouras, S-K-O-R-A-S or Spiros Skouras or Spiros or the word "Fair Star" or Gem Stone would appear.

THE COURT: Those were the vessels?

MR. SAFIR: There was a vessel called the S.S. FAIR STAR that was not one of my vessels, but it was a vessel which may have a bearing on this case.

The name Arthur Becker might also be added to the subpeona. The Nixon tape list, if such a name appears in connection with a Maritime conversation.

38-39-40

Second, I would need any record of White House calls to the home of Marshall Sapphire (sic) by John Erlichmann, collect or paid, for the months of June and July of 1970 and 1971; and those Nixon tapes immediately preceding and following such calls.

Four, I would need a subpeona duces tecum for one Arthur Becker, Esquire, of Washington, D.C., with his diary for the dates of June 1st, 2nd and 3rd, 1969, and all records in his possession of a transaction concerning the refurbishing of the troop ship S.S. FAIR STAR in September and October 1968.

Number five, a subpoena for the guest record for the Regency Hotel of New York for the dates of June 1st, 2nd and 3rd, 1969; and paragraph six, a subpoena duces tecum for Spiros Skouras, president of Prudential Lines, with his diaries of August through October 1968. The records of Prudential Lines are either travel arrangements for Mr. Skouras or his late father during that period, and diary and appointment records of his late father for that period, if such were available, if such are in existence, rather.

I would also need the cash disbursements and accounts payable records of Prudential Lines for the years 1968, '69, '70, ;71 and '72 and also those for the Prudential Grace Lines (pause) for a start. The records for the other lines would follow.

Now, the reason I asked for such an in depth and for such a serious thing, your Honor, is that most normal people, most Americans would consider it bizarre. They would have considered it bizarre until 1973 in Watergate for any person, lawyer or layman, to get up and make such statements and say he believes them about the President of the United States. And so, it was bizarre when I heard this conversation of Colemire to me. But it's no longer bizarre, and it's no longer improbable.

When you look at the history of this, the clients at this table -- the clients of these people at this table, and the recent history as to the bribes, payoffs, indictments of Federal officials that have been involved in the last few months, the general smelly aura of this whole industry, there has to be a time when somebody who has a stake, as I have, and not just an ordinary citizen's desire to do good, but a monetary stake, takes the position and goes all the way, and am prepared to go all the way on this case.

A dismissal of 77-C-1093 at this stage, and prior to discovery would be a miscarriage of justice.

MR. SAFIR: (continuing) What little law I know, and I pick up occasionally from my son who went to Yale Law School, he's in Washington, and I still get the Yale Law School books at my home where he used to get them, so I avidly read as I go along, and in March '74 there was an article on Federal Summary Judgment Doctrine, "a critical analysis" by one Martin B. Lewy, and on page 767, and in answer to Mr. Basseches', there is an

article about excusing an insufficient response, and it has to do with sometimes the opposing party cannot make a sufficient response because the affidavits and other supporting materials available to him do not represent a realistic preview of the evidence you will be able to present at trial. I don't have to read any more to you. You probably wrote it.

Anyway, my feelings about it are, that I must be given the opportunity to pursue this to its conclusion. The tools are available now. The Supreme Court has put them in our hands. I ask that the motion to dismiss or for summary judgment be denied, and that the subpoenas issued that I've requested. Thank you.

MR. MADDY: Mr. Safir seems to be suggesting or is suggesting that he be given the chance to do further discovery before your Honor rules on the motion for summary judgment, or he be given this opportunity, but I don't think that's appropriate under -- when he files his qui-tam's action.

The basis of the claim is that there was a false claim filed, and all of these other suspicions that Mr. Safir may have for various reasons is unsupported. He didn't have any information when we took his deposition. I don't think he should be given leave to go out and just take all these depositions. There's no -- there doesn't seem to be any possible relevance of those matters to the question of whether or not a false claim was filed with respect to thses particular subsidy vouchers. They may have interest for

other reasons, but they have no bearing on the question on filing a false claim.

Also, with respect to the way the deposition reads, I think we fairly quoted or referred to what the deposition said, and Mr. Safir signed it and swore to it. So we rest upon what's in that deposition, and not what Mr. Safir may say now when he seems to, in effect, seems to be changing his testimony given on that day.

THE COURT: No, he said he had it on tape.

MR. MADDY: Yes, your Honor. I must say we were basing it upon his sworn -- signed and sworn to deposition.

MR. SAFIR: I have the tape, your Honor, if I may interject, and to put it in the custody of the Court, where on side number 2, halfway through, the word "sounded" is the word, the word that was in the sentence. Can I leave this with Mr. Bachman?

THE COURT: Yes.

MR. SAFIR: Thank you.

THE COURT: Well, I will reserve decision on it. I don't think that I could at this time authorize the taking of depositions on the scale indicated before dealing with the papers that are now before me, because in a way, that taking would be more formidable than the case itself.

If in attempting to decide this I find that it cannot fairly be decided one way or the other without such further discovery, then I will act at that time.

MR. MADDY: Your Honor, we received Mr. Safir's papers yesterday. Could we have a short period of time to file a response thereto?

THE COURT: You received some of his papers yesterday?

MR. MADDY: Well, we got his latest version.

THE COURT: All right, yes, I see it is October 27th. Very well.

MR. MADDY: By next Friday then?

THE COURT: Yes.

MR. MADDY: Thank you.

MR. BASSECHES: Excuse me, your Honor, I mentioned a case which my colleague, Mr. Lewis, cautioned me to -- I don't know whether it's relevant or not, but let me put it in the record. The case is United States v. Borin, B-O-R-I-N.

THE COURT: That's in the briefs.

MR. BASSECHES: Right. That is cited in the briefs. That does address the issue of fraudulent concealment with respect to the Statute of Limitations.

THE COURT: Thank you, gentlemen.

(Whereupon Court stood in recess for the day.)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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MARSHALL P. SAFIR, Pro Se, and on Behalf of the United States of America,

Plaintiff

-against-

AMERICAN EXPORT LINES
AMERICAN PRESIDENT LINES
LYKES BROS. STEAMSHIP CO., INC.
MOORE McCORMACK LINES, Incorporated
UNITED STATES LINES, INC.
FARRELL LINES, INC.
BLOOMFIELD STEAMSHIP CO.
PRUDENTIAL GRACE LINES, INC.
PRUDENTIAL STEAMSHIP CO., INC.,

Defendants

Affidavit and Complaint

77c1093

----------X

MARSHALL P. SAFIR, Plaintiff, Pro Se, on this 26th day of May, 1977, having been duly sworn, deposes and says:

I. I am a citizen of the United States and of the State of New York who, in the year 1965, brought to the attention of the Joint Economic Committee of the Congress certain illegal concerted actions by these defendants. The Chairman, Senator Paul Douglas, after an open hearing then referred the matter to the Federal Maritime Commission for investigation.

The FMC then instituted a lengthy investigation (Docket 65-13)*, which culminated in a finding that these subsidized ocean carriers, acting in concert with others, violated Sec. 15 of the Shipping Act of 1916. This finding, inter alia, was incorporated in the FMC decision dated December 11, 1967.

Soon thereafter, this plaintiff filed an action in the nature of mandamus in this District (68c643) to compel the Secretary of Commerce to cease subsidy payments to the violators of Sec. 15 of the Shipping Act and to recover payments made to the violators since the violation on the theory that collateral estoppel existed between Sec. 15 of the Shipping Act and Sec. 810 of the Merchant Marine Act of 1936 in regard to the subsidized carriers. The history of the case from 1968 to 1977 is spelled out in detail in attachments A and B.

The seminal action, however, was brought in this District. All of the defendant violators intervened as defendants here before the learned Judge Dooling and all of these carriers, with one exception,[1] continue to transact business here.

Briefly, these ocean carriers were found to have violated Sec. 810 of the Merchant Marine Act (46 USC 1227) by the Mari-

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* Docket 65-13 Rates on Government Cargo 11FMC263-287 (1967)

[1] Bloomfield Steamship Company discontinued operations in 1966

time Administration in April 1973[2] and later on review by the Secretary of Commerce in September 1974[3] in hearings mandated by the Court of Appeals of this Second Circuit. The plaintiff alleges that this finding is now res judicata.

II. This Court has jurisdiction under 28 USC 1331, 1337 and 1651 and 31 USC 232. Venue is proper, pursuant to 28 USC Sec. 1391.

III. The statutes involved here are Title 46 USC 1227 and Title 31 USC 231, 232, 233, 235.

IV. On May 26, 1971, the Congress of the United States appropriated under the Second Supplemental Appropriation Act 1971 (PL92-18) the sum of $80,000,000 to liquidate past due obligations and about half $40,300,000 was appropriated to liquidate, in final part, unpaid ship operation subsidies for the calendar year 1968 and earlier years, the payment of which had been delayed by disagreements over subsidy amounts due the carriers. The sum of $43,150,521.84 was disbursed on and between May 27, 1971 and June 11, 1971 when disbursement was arrested pending decision on a motion by this plaintiff for an injuction against payment of these funds.

V. On June, 1971, Judge John Dooling of this Court, issued an order enjoining the payment of operating differential subsidy

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[2] See Attachment B, page 104a to 176a.

[3] See Attachment B, page 56a to 58a.

funds to the above-named defendants pending the outcome of a fact-finding investigation by the Department of Commerce as to whether Sec. 810 of the Merchant Marine Act of 1936 had been violated by these defendants. (See Memorandum Incorporating Finding of Fact and Order dated June 23, 1971, page 184A of Attachment B herein.)

The significance of the dates commencing with May 27, 1971 in regard to subsidy payments made for the offending period in 1965-1966 must be emphasized here. The payments in May and June of 1971 were explained by Judge Dooling, as follows:

> "The entire $40,300,000 appropriated to pay past-accrued but unliquidated subsidies is made up not of basic current operating differential subsidies, which are generally disbursed as earned more or less currently to the extent of about 90% to 95% of the amount ultimately determined to be due, but with the held back amounts consisting of balance amounts due only when finally determined and agreed on between the carrier and the administration."

In short, the statute of limitations on those obligations finally settled in 1971 and paid out in May-June of that year has not tolled as of this date in 1977 and the balances (5% to 10%) are inseparable segments of the false claims which were filed during and following the period of violation in 1965 and 1966.

VI. The issues involved in the complaint herein are now before the United States Supreme Court in Docket 76-1505, a copy of which

is enclosed as Attachment A. However, pending the outcome of that petition and an amended complaint in Docket 68c643,[4] a technical statute of limitations deadline may be argued in extremis by the defendants herein, if this complaint was not filed within the six-year statute of limitations for the anniversay dates of the final false claims disbursement. Hence, this complaint at this time. (See last paragraph page 20, attachment A and footnote.)

VII. This is a civil action for a judgement declaring the defendants liable for penalties and for the refund of double the sums paid out to the lines found in violation of Sec. 810 of the Merchant Marine Act 1936 as a consequence of the collateral estoppel effect of this violation on 31 USC 231, and for an order implementing such recovery on behalf of the plaintiff herein and the United States of America.

VIII. Plaintiff alleges that the illegal behavior was in violation of the operating differential subsidy contract signed between the government and the contractors incorporating the wording of Sec. 810, and that the clear provisions of the statute and subsidy contracts, both binding on the defendants, were deceitfully violated when without any overture to the Department of Commerce they

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[4] The U.S. District Court for the District of Columbia is also open as a forum for amended complaint incorporating 31 USC 231 et seq. covering construction differential subsidies paid during the offending period where no residual balances were paid out in 1971. See Attachment B, page 17a.

acted in concert to destroy an unsubsidized American Flag competitor.

IX. That these actions were inimicable to the interests of the United States in that the weight and leverage of subsidy funding was to hurt an American competitor without the knowledge of the contracting agency charged with the responsibility for promoting the welfare of the American Merchant Marine.

X. That, simulataneous with the filing of this complaint, a notice of pendency is being served on the U. S. Attorney for the Eastern District and the Attorney General of the United States. That, because of requirements of 31 USC 232(c), plaintiff Safir is stayed from proceeding with this action during the time reserved to the Government to decide whether to proceed with the prosecution, that he pleads pro se pending prosecution by the Attorney General, or waiver. That, in the event of waiver, plaintiff Safir will engage licensed counsel to proceed as set forth in 31 USC 232(e)(2).

WHEREFORE, Plaintiff Prays:

(1) That all moneys paid out during the period of violation or reasonably allocable thereto for operating differential subsidies, as set forth in the schedule on page 208A of Attachment B annexed hereto, (and which schedule is subject to final adjustment) be refunded to the United States, as they were falsely claimed and illegally paid out.

(2) That, the provisions of Title 31 USC 231 for penalty plus double the amount of false claims finalized by the payments in

May and June of 1971 be assessed on the final audited amounts paid to each in dividual carrier plus the statutory amount for each false voucher submitted.

Respectfully submitted,

/s/ Marshall P. Safir

Marshall P. Safir, Pro Se
41 Flatbush Avenue
Brooklyn, New York 11217
Tel. No.: 212 - 858 - 2700

May 26th, 1977

Marshall P. Safir
41 Flatbush Avenue
Brooklyn, New York 11217

May 26, 1977

Honorable Griffen Bell
Attorney General of the United States
Department of Justice
Washington, D.C. 20530

Dear Sir:

This is to notify you of the pendency of an action filed this day in the Federal District Court for the Eastern District of New York under Title 31USC Sec. 232(b) on behalf of the undersigned and the United States of America against certain subsidized ocean carriers.

Enclosed herewith in accordance with Title 31USC Sec. 232(c) is a copy of the complaint with attachments A and B comprising substantially all of the pertinent evidence and information material to the effective prosecution if this suit. If additional information is needed the undersigned is prepared to cooperate fully.

In accordance with this section of the law, if the United States shall fail, or decline in writing to the court after a period of sixty days after service to enter this suit the undersigned will proceed to engage licensed counsel to prosecute the case on behalf of the United States of America and himself.

Respectfully yours,

/s/ Marshall P. Safir

MPS:rl

Marshall P. Safir

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES ex rel. MARSHALL P. SAFIR,	:	
Plaintiffs	:	DECLINATION OF APPEARANCE
v.	:	Civil Action No. 77 C 1093
AMERICAN EXPORT LINES, et al.,	:	
Defendants.	:	

The United States of America, by David G. Trager, United States Attorney for the Eastern District of New York, pursuant to the provisions of the False Claims Act, 31 U.S.C. §§231-235, hereby states as follows:

1. This is a qui tam action brought by plaintiff, Marshall P. Safir on behalf of the United States of America, as well as for himself pursuant to 31 U.S.C. §232(B).

2. The United States of America, pursuant to 31 U.S.C. §232(C), hereby declines to enter this action.

3. In commencing this action, plaintiff Safir has provided the Department of Justice with a copy of his Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia, and a copy of the Appendix thereto, which he has stated comprises his disclosure, pursuant to 31 U.S.C. §232(C), of substantially all the pertinent

evidence and information material to the effective prosecution of this suit.

4. Based upon an examination of this material, the United States has concluded that the central issue of plaintiff Safir's allegations in this action is presently being litigated in the United States District Court for the District of Columbia in an action styled Marshall P. Safir, plaintiff v. Juanita M. Kreps, et al., defendants, Civil Action No. 74-1474. See Safir v. Kreps, 551 F.2d 447 (D.C. Cir. 1977), petition for cert. filed, 45 U.S.L.W. 3733 (U.S. May 10, 1977) (No. 76-1505).

Dated: Brooklyn, New York
June 21, 1977

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

By: /s/ Elaine Buck
ELAINE BUCK
Assistant U. S. Attorney

THE SECRETARY OF COMMERCE

Washington, D.C. 20230

ORDER

In the Matter of:

Subsidy Board Docket No. S-243 Investigation of Alleged Violations of Section 810 of the Merchant Marine Act, 1936, as amended.

The petitions of American Export Lines, Inc., Lykes Bros. Steamship Co., Inc., Moore-McCormack Lines, Inc., Bloomfield Steamship Co. and United States Lines for review of the Maritime Subsidy Board's decisions of April 9, 1973 and October 10, 1973 are hereby granted, solely with respect to the mitigating circumstances and appropriate sanctions to be imposed on the trade respondents. In all other respects, the petitions are denied. The petition for review of American President Lines, Ltd., Farrell Lines, Inc., Prudential-Grace Lines, Inc., and Prudential Steamship Company, Inc. is denied.

The record before me fully presents the contentions of the parties without need for further submissions or delay.

The record indicates that the United States Government actively induced the rate reductions here in issue, and received substantial financial benefit from such reductions. The record further suppports the conclusion that, but for the active inducement of federal officials, rates found by the Federal Maritime Commission previously not to have been unreasonably high would not have been reduced to noncompensating levels by respondents.

Order of U.S. District Court,
District of Columbia, Dated October 21, 1975

Civil Action No. 74-1474

MARSHALL P. SAFIR,

Plaintiff,

—v.—

FREDERICK DENT, individually and as Secretary of Commerce,

Defendant,

AMERICAN PRESIDENT LINES, LTD., et al.,

Intervening Defendants.

Order

Plaintiff Marshall P. Safir, having moved for summary judgment, defendant Frederick Dent, and intervening defendants' Trade Lines and Non-Trade Lines having replied to plaintiff's motion and cross-moved for summary judgment, the Court having considered the motions, memoranda of points and authorities of all parties, it is hereby

ORDERED that the plaintiff's motion for summary judgment is denied, that defendant's and intervening defendants' motions for summary judgment are granted and the complaint herein is dismissed with prejudice this 21st day of October, 1975.

.....

Order of Secretary of Commerce
Dated September 9, 1974

Accordingly, having considered the total circumstances surrounding the rate reductions in question, it is my conclusion that recovery from each of the trade respondents in the October 10, 1973 Final Order on Recoveries shall be modified by reducing the total amount of subsidy subject to recovery to $1,126,522.26 to be apportioned in accordance with the table attached hereto.

The adjustment here ordered is made to reflect the effect of the United States Government action, notwithstanding that the trade respondents shared in a greater or lesser individual degree in the improper conduct that has been determined to have occurred as charged in the petition to the Board.

So ORDERED

.....
Secretary of Commerce

Date: September 9, 1974

TABLE

	COMPANIES				
	AEL	Bloomfield	Lykes	Mormac	United States Lines
Total affected operating differential Subsidy paid during relevant period	$203,739.84	$750,551.12	$2,725,587.69	$ 968,091	$11,082,875
Percentage of Military Cargo to Freight Revenues	*23.77%	24.7%	27.99%	53.27%	17.5%
Portion of Operating Differential Subsidy related to Military Cargo	$ 48,428.83	$185,386.13	$ 762,891.99	$515,702.075	$ 1,949,168.53
Reduction of 50% due to Inducement of Government Officials	$ 24,214.43	$ 92,693.07	$ 381,446	$257,702.075	$ 974,584.27
Reduction due to Special Mitigating Circumstances	$ 18,160.82	$ 46,346.54	———	$193,276.76	$ 487,292.14
Amount Subject to Recovery	$ 18,160.82	$ 46,346.54	$ 381,446	$193,276.76	$ 487,292.14

* The Maritime Subsidy Board has advised that the percentage expressing the relationship between total revenues and military cargos should be changed to this figure.

Opinion and Order of the Maritime Subsidy Board, Dated April 16th, 1973

U.S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
MARITIME SUBSIDY BOARD

Docket No. S-243

Investigation of Alleged Section 810 Violation

In the matter of the complaint of Sapphire Steamship Lines, Inc. re Alleged Violation by Atlantic and Gulf American Flag Berth Operators (AGAFBO) of Section 810 of the Merchant Marine Act, 1936, as amended.

Chairman, Robert J. Blackwell; Member, H. Clayton Cook, Jr.; Alternate Member, James S. Dawson, Jr.

Served Upon:

Marshall P. Safir, 41 Flatbush Avenue, Brooklyn, New York 11217 *pro se.*

James N. Jacobi, Esq., Kurrus & Jacobi, 2000 K Street, N. W., Washington, D. C. 20006 for American Export Lines, Inc.

J. Franklin Fort, Esq. and *Richard S. Salzman, Esq.,* Kominers, Fort, Schlefer & Boyer, 1401 K Street, N. W., Washington, D. C. 20005 for Lykes Bros. Steamship Co., Inc. and Moore-McCormack Lines, Incorporated.

John Williams, Esq., Kirlin, Campbell & Keating, 120 Broadway, New York, New York 10005 for United States Lines, Inc.

Opinion and Order of the Maritime Subsidy Board, Dated April 16th, 1973

Amy Scupi, Esq. and *Olga Boikess, Esq.*, Galland, Kharasch, Calkins & Brown, 1054 31st Street, N. W., Washington, D. C. 20007 for Bloomfield Steamship Co.

Robert T. Basseches, Esq., Shea & Gardner, 734 Fifteenth Street, N. W., Washington, D. C. 20005 and *Daniel H. Margolis, Esq.*, and *Murray J. Belman, Esq.*, 21 Dupont Circle, N. W., Washington, D. C. 20036 for American President Lines, Ltd., Prudential-Grace Lines, Inc. and Prudential Steamship Company, Inc.

Verne W. Vance, Esq. and *Andrew J. McElaney, Jr., Esq.*, Foley, Hoag & Eliot, 10 Post Office Square, Boston, Massachusetts 02109 for Farrell Lines, Inc.

Michael J. McMorrow, Esq., Maritime Administration, Washington, D. C. 20235, as Public Counsel.

Docket No. S-243 is an investigative proceeding instituted by the Maritime Subsidy Board (Board) on October 24, 1969 to determine whether Section 810 of the Merchant Marine Act, 1936, as amended (Act),[1] had been violated by conduct of certain carrier members of the Atlantic and Gulf American Flag Berth Operators (AGAFBO) and the appropriate action that should be taken. Named as parties to the proceeding were petitioners Sapphire Steamship Company (Sapphire) and its individual owners, Marshall P. Safir and Arnold Weissberger, who along with others,[2] had petitioned

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[1] 46 U.S.C. § 1227 (1970).

[2] These were two service organizations, Pioneer Overseas Services Corporation, a traffic management agency wholly owned by Mr. Safir, and Liberty-Pac International Corporation, a freight forwarder specializing in the overseas transportation of household goods wholly owned by Mr. Weissberger. They were extended the opportunity to file petition for leave to intervene in the proceeding but never made such filing. Of all the petitioners,

Opinion and Order of the Maritime Subsidy Board, Dated April 16th, 1973

CONCLUSION

Based upon the foregoing discussion and findings and after full consideration of the record compiled in this proceeding, including all arguments and presentations by all parties and the Chief Judge's Recommended Decision, we find and conclude that:

1) All respondents violation Section 810 of the Merchant Marine Act, 1936, as amended, and applicable provisions of their ODS contracts by acting in concert to reduce rates on selected military cargo carried in U.S. Atlantic & Gulf to United Kingdom/Bordeaux/Hamburg area and holding such rates at such levels during the period March 29, 1965 to March 1, 1966 (but as to respondent Bloomfield only until and including December 31, 1965) in order to unjustly discriminate and unfairly compete against Sapphire Steamship Company, and

2) In consideration of pertinent mitigating circumstances respondents owe. Subject to documentation by said respondents and Public Counsel, the following for such violations of Section 810:

   (a) Respondents APL, Farrell, Grace and Prudential, who did not compete with Sapphire and whose violations are technical only, no amount;

   (b) Respondent Lykes about $1,130,123 to be accounted for on terms satisfactory to the Government;

   (c) Respondent AEL about $38,036 to be accounted for on terms satisfactory to the Government;

Memorandum Incorporating Finding of Fact and Order, Dated June 6, 1972

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

68 C 643

MARSHALL P. SAFIR,

Plaintiff,

—against—

ANDREW GIBSON, Acting Maritime Administrator, Maritime Administration, U.S. Department of Commerce, et al.,

Defendants.

DOOLING, *D.J.*:

Plaintiff moves for an order requiring the Secretary of Commerce to pay the purchase price of the S.S. UNITED STATES into escrow and to establish an escrow of all amounts payable to the present shipowners upon their sales of the S.S. ARGENTINA, the S.S. BRAZIL, the S.S. SANTA ROSE, the S.S. SANTA PAULA, and the S.S. CONSTITUTION; the amounts referred to are expected to become payable under the provisions of Public Law 92-296 effective May 17, 1972 to United States Lines, Inc. (on the Government's purchase of the S.S. UNITED STATES under the public Law), to Moore-McCormack Lines, Incorporated (on the sale of the S.S. ARGENTINA and the S.S. BRAZIL into foreign ownership, registry, and flag pursuant to the provisions of Public Law 92-296 and subject to its limitations), to American Export Isbrandtsen Lines, Inc. (on the sale of the S.S. CONSTITUTION into foreign ownership, registry, and flag pursuant to the same public Law), and to Prudential-Grace Lines, Inc. under the same Public Law.

Memorandum Incorporating Finding of Fact and Order, Dated June 6, 1972

It appears that the recommended decision of the Hearing Examiner, rendered April 12, 1972, would require repayments by Moore-McCormack of $759,704, by United States Lines of $3,243,865 and by American Export Lines of $22,373 and that Prudential-Grace would not be required to make any refund payment. The Maritime Subsidy Board of the Maritime Administration has not yet reviewed the recommended decision of the Hearing Examiner. Exceptions have been taken to the Hearing Examiner's report by both sides and the exceptions are still undetermined.

Meanwhile and wholly separately the Congress passed and the President approved Public Law 92-296, effective May 17, 1972. It provides for the disposition of laid-up passenger vessels which had been operated under operating differential subsidy contracts with the United States. The law provides that, except for the vessels INDEPENDENCE and UNITED STATES, the laid-up vessels may be sold and transferred to foreign ownership, registry and flag with the approval of the Secretary of Commerce provided, among other things, that the seller agrees with the Secretary that an amount equal to the net proceeds received from the sale in excess of existing obligations and incidental expenses shall within a year of receipt be committed to and thereafter used as equity capital to build new vessels which the Secretary determines are built to effectuate the purposes and policies of the Merchant Marine Act of 1936 as amended. Section 2 of the same Act authorizes the Secretary to purchase the UNITED STATES at depreciated cost less the unpaid principal and interest on the mortgage on the vessel for lay-up in the National Defense Reserve Fleet.

Plaintiff contends that since the amount ultimately possibly recoverable by the Government from the AGAFBO steamship companies may rise as high as half a billion dol-

lars if the Examiner's recommended decision is not adopted, the amounts of money coming into the hands of the steamship companies under the new legislation should, in effect, be impounded to secure the payments that the steamship companies might be required to make to the United States under the final decision.

The motion must be in all respects denied.

The payments being made are not payments of subsidies in respect of the periods during which the offensive conduct was continued. The only ground on which the motion can be made is that a sort of anticipatory execution should be issued to assure that, if the ultimate decision directs greater refunds of operating differential subsidy than the Examiner recommends, funds to pay the refunds will be at hand. However, there is no reason to frustrate the functioning of the statute involved. The evidence presented does not indicate that the ability of any of the steamship companies to respond will be worsened by carrying out the new statute according to its terms or that any of the steamship companies will be in a position to dissipate the funds. Only in the case of the amounts paid to the United States Lines does it appear that refunds will pass into the unrestricted possession of the steamship company. The evidence shows that United States Lines is abundantly solvent. Similarly the evidence is that Moore-McCormack and American Export Isbrandtsen Lines, Inc. are solvent and will be able to respond to any requirement that they make refunds of subsidy.

No reason appears why the plaintiff should be entitled at this time to relief which is based essentially on the assumption that the Examiner's recommended decision is wrong and that the final decision will order vastly larger

refunds. No such inference can be indulged to support an application for the relief of preliminary injunction. If that inference could be indulged, every other asset and every other pending receipt of any of the steamship companies could with equal plausibility be subjected to a demand that it be placed in escrow or otherwise set aside for execution in the event that large recoveries were ordered by the Subsidy Board. The affidavit of the Assistant Secretary of the Maritime Subsidy Board and the Maritime Administration shows that withheld amounts of operating differential subsidy of the four steamship companies exceed the amounts of the Hearing Examiner's recommended refund except in the case of United States Lines, which according to the official records of the Maritime Administration has a net worth of $74,000,000.

Plaintiff argues that he may have an individual right to participate in any ultimate recovery by the Government under *qui tam* legislation. No statute authorizing a *qui tam* recovery or *qui tam* proceedings has been pointed to and the decision in *Connecticut Action Now, Inc.* v. *Roberts Plating Company, Inc.*, 2d Cir. 1972, Slip Opinion page 2253 makes it reasonably clear that the plaintiff has no *qui tam* interest in the Government's recovery under Section 810 of the Merchant Marine Act, 1936 as amended (46 U.S.C. § 1227).

It is accordingly

ORDERED that the plaintiff's motions brought on by Orders to Show Cause dated May 4 and May 17, 1972, are in all respects denied.

Brooklyn, New York, June 6, 1972.

JOHN F. DOOLING, JR.,
U. S. D. J.

Decision (Per Curiam)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 237—September Term, 1972.

(Argued November 27, 1972 Decided November 29, 1972.)

Docket No. 72-1753

MARSHALL P. SAFIR,

Appellant,

v.

ROBERT J. BLACKWELL, Maritime Administrator, Maritime Administration, U.S. Department of Commerce, et al., MOORE-MCCORMACK LINES, INC., UNITED STATES LINES, INC., AMERICAN EXPORT LINES, INC., and PRUDENTIAL-GRACE LINES, INC.,

Appellees.

Before:

FRIENDLY, *Chief Judge,*

WATERMAN and HAYS, *Circuit Judges.*

Appeal from an order of the District Court for the Eastern District of New York, John F. Dooling, Jr., *Judge,* denying plaintiff's motion for an order requiring the payment into escrow of sums expected to be received by the ship operator defendants on the sale of certain ships.

Affirmed.

Decision (Per Curiam)

PER CURIAM:

In this case, which is now here for the third time, see *Safir* v. *Gibson*, 417 F.2d 972 (2 Cir. 1969); *Safir* v. *Gibson*, 432 F.2d 137 (2 Cir.), *cert. denied*, 400 U.S. 850 (1970), plaintiff Safir moved to require the ship operator defendants to pay into escrow moneys expected to become payable to them in consequence of the sale of certain American flag ships authorized by Public Law 92-296, which became effective May 17, 1972. The motion was based on plaintiff's fear that the defendants might not be financially able to respond to a direction for the repayment of operating differential subsidies which may be made by the Maritime Administration Maritime Subsidy Board in the proceeding, Docket No. S. 243, instituted as a result of our first decision. The Assistant Secretary of the Board and of the Administration submitted an affidavit indicating that the Government entertained no doubt of its ability to recover, by set-off or otherwise, any amounts that might ultimately be found to be repayable. Accepting this conclusion, the district court denied the requested relief.

The judge's order was well within his discretion; he was not bound to accept plaintiff's assertions that the recoveries will run vastly beyond the sums recommended by the Chief Hearing Examiner in respect of three of the four ship operator defendants. We share plaintiff's concern over the time that the Maritime Administration has taken to decide this matter, especially in light of the narrowing of the issues by our 1970 decision. However, we were advised at argument that, at long last, the matter has now been finally submitted, and we expect it to be promptly decided.

Plaintiff complains of a statement by the district judge that he would have no interest in any recovery by the Government. This statement was unnecessary to the deci-

sion and we have no occasion either to approve or to disapprove it.

Affirmed.

MARSHALL P. SAFIR, *Appellant Pro-Se.*

GILBERT S. FLEISCHER, Esq., New York, N.Y., Attorney in Charge, New York Office, Admiralty and Shipping Section, Department of Justice (Harlington Wood, Jr., Esq., Assistant Attorney General, Robert A. Morse, Esq., United States Attorney, of Counsel), *for Appellees Robert J. Blackwell, Maritime Administrator, et al.*

RICHARD S. SALZMAN, Esq., Washington, D.C. (J. Franklin Fort, Esq., Kominers, Fort, Schlefer & Boyer, Washington, D.C., of Counsel), *for Appellee Moore-McCormack Lines, Inc.*

ELMER C. MADDY, Esq., New York, N.Y. (Kirlin, Campbell & Keating, New York, N.Y., of Counsel), *for Appellee United States Lines, Inc.*

JAMES N. JACOBI, Esq., Washington, D.C. (Kurrus and Jacobi, Washington, D.C., of Counsel), *for Appellee American Export Lines, Inc.*

MICHAEL O. FINKELSTEIN, Esq., New York, N.Y. (Barrett, Knapp, Smith, Schapiro & Simon, New York, N.Y., Daniel H. Margolis, Esq., and Bergson, Borkland, Margolis & Adler, Washington, D.C., of Counsel), *for Appellee Prudential-Grace Lines, Inc.*

Memorandum Incorporating Findings of Fact and Order, Dated June 23, 1971

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

MARSHALL P. SAFIR and SAPPHIRE STEAMSHIP LINES, INC.,
Plaintiffs,

—against—

ANDREW GIBSON, Acting Maritime Administrator, Maritime Administration, United States Department of Commerce, JAMES S. DAWSON, JR., Secretary, Maritime Subsidy Board, Maritime Administration, United States Department of Commerce, and MAURICE STANS, Secretary of Commerce of the United States, AMERICAN PRESIDENT LINES, LTD., PRUDENTIAL LINES, INC. and GRACE LINE, INC. (Now operating as "Prudential-Grace Lines, Inc.") and FARRELL LINES, INC., AMERICAN EXPORT ISBRANDTSEN LINES, INC., BLOOMFIELD STEAMSHIP CO., LYKES BROS. STEAMSHIP COMPANY, INC., MOORE MCCORMACK LINES, INC., and UNITED STATES LINES, INC.,

Defendants.

DOOLING, *D.J.*:

Plaintiffs move for an injunction *pendente lite,* against the Maritime Administration's disbursing to the defendant AGAFBO carriers any part of the $80,000,000 appropriated by the Second Supplemental Appropriation Act, 1971, for the fiscal year ended June 30, 1971 (PL 92-18, approved May 26, 1971). Of the $80,000,000 about half, $40,300,000, is appropriated to liquidate, in part, unpaid ship operation subsidies for the calendar year 1968 and earlier years

the payment of which has been delayed by disagreements over the subsidy amounts due the carriers. $43,150,521.94 was disbursed on and between May 27, 1971 and June 11, 1971, when disbursement was arrested pending decision of the present motion, leaving about $36,850,000 undisbursed, but how much of each segment comprises a part of the $40,300,000 is not disclosed, perhaps is not quickly determinable. The entire $40,300,000 appropriated to pay past-accrued but unliquidated subsidies is made up not of basic current-operating differential subsidies, which are generally disbursed as earned more or less currently to the extent of about 90% to 95% of the amount ultimately determined to be due, but with the held-back amounts consisting of balance-amounts due only when finally determined and agreed upon between carrier and Administration. The Secretary of the Maritime Subsidy Board avers without contradiction that of the $43,150,521.94 already disbursed $9,819,000. is the amount paid to the defendant AGAFBO carriers as past-accrued operating subsidies due for the whole of the two calendar years 1965 and 1966 which, together, include the eleven months of the accused rate-reduction. Eleven twenty-fourths of that total is somewhat over $4,500,000. How much of the undisbursed $36,850,000 will become ascribable to past-accrued operating subsidies of the years 1965 and 1966 is not stated. The defendant carriers, it is said, have unpaid vouchers, still unaudited and unauthenticated, lodged with the Board in the aggregate amount of $62,702,765, all of which, if audited and allowed, could, self-evidently, not be paid out of the present appropriation.

The matter is urgent because the availability of the appropriated funds will end at June 30, 1971, and renewal of the appropriation would, it seems, have to await fresh budgetary and Congressional action.

Memorandum Incorporating Findings of Fact and Order, Dated June 23, 1971

Plaintiffs' central argument is that the present funds are not, within the meaning of the Court's decision, "current subsidy payments" (432 F.2d at 140, col. 2) payment of which ought not be enjoined, but belong to the radically distinguishable class of "payments . . . during the violation" (417 F.2d at 977, 432 F.2d at 140, col. 2), which, adventitiously, are found undisbursed and which, therefore, present afresh the, indeed, related but new question, should the Administration be required to withhold payment of an amount which the Administration may ultimately determine should not be paid because of the command of 46 U.S.C. § 1227, second paragraph ("Section 810")?

Most of the reasons urged for an injunction are not matters that would warrant judicial interference with the Administration's discharge of its responsibilities under the law as spelled out in the earlier decisions of the Court of Appeals, and an injunction could not be granted under the earlier decisions but for a differentiating feature here presented. It may have lurked in earlier determinations, but if so it was not brought forward recognizably.

Plainly enough, the issue here is differentiable from that which the Court determined on the injunction appeal. The dispositive difference is that before any disbursement is made that manifestly raises a substantial question under Section 810 there must be a specific and advertent decision by the Administration to make, to detain pending further review, or to refuse the payment. It is not a payment of past history presenting the question of whether in the light of all the circumstances the Administration should seek to recover money long since paid out and embedded in ship operations. The right to receive subsidy payments for the accused period is now directly in issue between the

Memorandum Incorporating Findings of Fact and Order, Dated June 23, 1971

Administration and each affected carrier. The issue is whether, apart from the usually controlling earnings standards, etc., and in the light of the Commission's decision under 46 U.S.C. § 814 ("Section 15") and the Congressional command of Section 810, the payment is due and should be made automatically.

There is no distinct evidence that the matter of disbursement has been considered in the light of determining before disbursement the propriety of making a payment entitlement to which depends on the resolution of a policy decision to be made under Section 810. The Board's letter of June 8, 1971, to plaintiff Safir rather indicates the contrary, in part because the plaintiff Safir's peremptory telegram of May 28, 1971, dealt with the whole $80,000,000 and with withholding, as offset, to secure the payment of any recovery that might be directed in proceeding S-243. Yet the Court of Appeals decisions plainly required that no payment be made without a prior advertent and adequate dealing with the policy matters bearing on payability.

Seen in this perspective the duty of the Administration is forthwith to make a decision of record based on stated grounds either to make payment (absolutely or conditionally), to withhold payment pending review, or to refuse payment of so much of the undisbursed $36,849,478.06 appropriated by Public Law 92-18 of May 27, 1971, as represents payments to the defendant carriers in respect of past-accrued operating subsidies for the eleven month period March 31, 1965, to March 1, 1966.

In this analysis, which singles out for immediate rectification the apparent omission of an indispensable stage of judgmatical administrative action, the conventional stan-

Memorandum Incorporating Findings of Fact and Order, Dated June 23, 1971

dards for granting injunctive relief, viewed as an extraordinary equitable remedy, are largely if not entirely irrelevant.

It is, accordingly,

ORDERED that the defendants Andrew Gibson, Acting Maritime Administrator, Maritime Administration, United States Department of Commerce, James S. Dawson, Jr., Secretary, Maritime Subsidy Board, Maritime Administration, United States Department of Commerce, and Maurice Stans, Secretary of Commerce of the United States, are enjoined from paying to American President Lines, Ltd., Prudential Lines, Inc. and Grace Line, Inc. (Now operating as "Prudential-Grace Lines, Inc.") and Farrell Lines, Inc., American Export Isbrandtsen Lines, Inc., Bloomfield Steamship Co., Lykes Bros. Steamship Company, Inc., Moore McCormack Lines, Inc., and United States Lines, Inc., so much of the undisbursed $36,849,478.06 appropriated by Public Law 92-18 of May 27, 1971, as represents payments to the defendant carriers in respect of past-accrued operating subsidies for the eleven month period March 31, 1965, to March 1, 1966, unless after a decision of record is made by the Maritime Administration on stated grounds to do so notwithstanding the determination of the Federal Maritime Commission of December 12, 1967, in Docket No. 65-13 under 46 U.S.C. §§ 814, 817, and the terms of 46 U.S.C. § 1227, or unless upon the taking of adequate stipulations and security measures for refunding that will assure that the issue whether the amounts should have been disbursed is determinable after payment exactly as if the whole decision-making process preceded the payment; and it is further

Memorandum Incorporating Findings of Fact and Order, Dated June 23, 1971

ORDERED that plaintiff give security in the amount of $5,000 conditioned as required by Rule 65; and it is further

ORDERED that the defendants' application for a stay is denied; and it is further

ORDERED that plaintiff's motion for injunction is in all other respects denied; and it is further

ORDERED that the denial of injunction, as set forth in the preceding decretal paragraph, is stayed until 2:00 P.M. June 24, 1971, and the defendant public officers are directed until then to continue the present voluntary stay of disbursements to the defendant carriers from the appropriated funds.

Brooklyn, New York, June 22, 1971.

JOHN F. DOOLING, JR.,
U. S. D. J.

Opinion of the Court of Appeals on Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 552—September Term, 1969.
(Decided June 18, 1970.)

Docket No. 34355

MARSHALL P. SAFIR, ARNOLD WEISBERGER and SAPPHIRE STEAMSHIP LINES, INC.,
Plaintiffs-Appellants,

—v.—

ANDREW GIBSON, Successor to and Substituted for JAMES W. GULICK, Acting Maritime Administrator, Maritime Administration, United States Department of Commerce, JAMES S. DAWSON, JR., Secretary, Maritime Subsidy Board, Maritime Administration, United States Department of Commerce, and MAURICE STANS, Successor to and Substituted for C. R. SMITH, Secretary of Commerce of the United States,
Defendants-Appellees,

AMERICAN EXPORT ISBRANDTSEN LINES, INC., BLOOMFIELD STEAMSHIP CO.; LYKES BROS. STEAMSHIP COMPANY, INC.; MOORE-MCCORMACK LINES, INC.; UNITED STATES LINES, INC., AMERICAN PRESIDENT LINES, LTD.; PRUDENTIAL STEAMSHIP CO., INC. and PRUDENTIAL GRACE LINES, INC.; and FARRELL LINES, INC.,
Intervenors.

Before:

LUMBARD, *Chief Judge,*

FRIENDLY and FEINBERG, *Circuit Judges.*

On Petitions of Intervenors for Rehearing

Opinion of the Court of Appeals on Petition for Rehearing

PER CURIAM:

In our decision of February 26, 1970, — F.2d —, slip opinions 1697, we directed the district court "to instruct the Maritime Administration not to redetermine the issue whether the AGAFBO carriers' concerted action in reducing their rates to an unreasonably low level and holding them there for eleven months was unjustly discriminatory or unfair to Sapphire." Shortly thereafter, the AGAFBO lines, which, although fully aware of this action, had been sedulously abstaining from participation, see 417 F.2d 972, 976 n. 4 (1969); — F.2d at —, sought leave to intervene for the purpose of seeking a rehearing on that portion of our decision. We granted such leave, received petitions and accompanying briefs, and then called upon counsel for the appellants and appellees to respond.[1]

The argument most strongly pressed by the intervenors is that they had no sufficient incentive and, indeed, no opportunity to appeal the adverse findings of the FMC, see — F.2d at —, slip opinions at 1705. The latter branch of the argument hangs mainly on the fact that the rates found by the FMC to give rise to a violation of § 15 of the Shipping Act had expired and therefore could no longer be disapproved under § 18(b)(5). But § 15 subjects offending lines to a penalty of $1000 per day of violation. Since the FMC's determination would be conclusive in a civil action

[1] We requested counsel for the appellees to obtain the views of the Federal Maritime Commission. The latter, taking no position with respect to other issues, has advised "that its sole concern here, in the context of its responsibilities under the Shipping Act, is to insure that the finality of its determinations is preserved and that its factual findings will not be litigated long after the statutorily prescribed time for judicial review has run and in proceedings to which it is a stranger." This was the precise object of our decision.

for penalties, it was therefore clearly appealable. See *Pacific Far East Lines, Inc.* v. *FMC*, 410 F.2d 257 (D.C. Cir. 1969). In view of the sharp tone of the FMC report and the even sharper one of the separate opinion of two members, the intervenors could hardly have taken lightly the threat of the Government's suing for a penalty; indeed, we are informed that five of them have recently settled their liability by paying $25,000 each. Moreover, while we relied mainly on this point, — F.2d at —, slip opinions at 1705, we did not at all mean to suggest that the AGAFBO lines should not have been aware of the possible effect of the FMC determination in a proceeding under § 810 of the Merchant Marine Act, of whose potentiality they were apprised very shortly after the FMC decision.

The Government makes the point that if appellants wished to have the Maritime Subsidy Board give conclusive effect to the FMC decision, the Board has a procedure enabling them to raise this matter in limine. They could have moved for a summary disposition of the issue by the Hearing Examiner, 46 C.F.R. 201.91, could have requested permission from him to appeal an adverse decision to the full Maritime Administration, 46 C.F.R. 201.93, and if that were granted and the appeal proved unsuccessful, could have sought further review by the Secretary of Commerce, 46 C.F.R. 202.1. Be all this as it may, we were faced with a statement by the district judge, implying that the FMC determination did not have binding effect, — F.2d at —, slip opinions at 1699-1700, and, after two and a half years, we see no point in launching appellants on the wearisome course the Government has plotted when we are clear that the legal issue must be decided in their favor. The short of the matter is that nothing advanced by the intervenors or the Government alters our conclusion that "it would be quite unseemly for the Maritime Administration

to conclude that its sister agency had been wrong in a fully litigated issue the decision of which Congress had confided to it." — F.2d at —, slip opinions at 1705.

Two minor points should be mentioned. Four intervenors, American President Lines, Ltd., Prudential Steamship Co., Inc., Prudential-Grace Lines, Inc., and Farrell Lines, Inc., urge that they were not competing with Sapphire, had no interest in the rates which the FMC condemned and never voted on these. We see no reason for the concern felt by these carriers. We directed only that the issue whether the reduction of the rates was unjustly discriminatory or unfair to Sapphire was not to be relied upon before the Maritime Administration; we said nothing about who was responsible for these and, by a *footnote 2,* emphasized that "Nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carriers' participation in the illegal action . . ." On the other side, the Government is fearful lest "the tenor of the opinion and the rationale underlying it would appear to foreclose the Maritime Subsidy Board from investigating and concluding, contrary to a majority of the FMC, that a wider conspiracy existed." But there was no "majority" finding on the issue of a wider conspiracy, since the four participating members divided two to two. The issue therefore remains open.

The intervenors' petitions for rehearing are denied.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA,
ex rel MARSHALL P. SAFIR and
MARSHALL P. SAFIR,

Plaintiffs,

68 Civ. 643
(JFD)

- against -

ROBERT J. BLACKWELL, Assistant Secretary for Maritime Affairs, United States Department of Commerce, Successor to and Substituted for James W. Gulick and Andrew Gibson, formerly Acting Maritime Administrators, James S. Dawson, Secretary, Maritime Subsidy Board, Maritime Administration, United States Department of Commerce, JUANITA KREPS, Secretary of Commerce of the United States, Successor to and Substituded for C.R. Smith and Maurice Stans, former Secretaries of Commerce,

AMENDED COMPLAINT

Defendants,

AMERICAN EXPORT ISBRANDTSEN LINES, INC., AMERICAN PRESIDENT LINES, LTD. LYKES BROS. STEAMSHIP COMPANY, INC., MOORE-McCORMACK LINES, UNITED STATES LINES, INC., FARRELL LINES, INC.,

BLOOMFIELD STEAMSHIP CO.,
PRUDENTIAL GRACE LINES, INC.
and PRUDENTIAL STEAMSHIP CO.,
INC.,

Carrier Defendants,
----------X

Plaintiffs by their attorneys, for their amended complaint, allege, as follows:

FIRST: This action arises and this Court has jurisdiction by virtue of the following statutes: 46 U.S.C. sec. 1227, (Merchant Marine Act of 1936); 5 U.S.C. sec. 702, 703, 704, 706 (the agency generally); 28 U.S.C. sec. 2201, 2202 (declaratory judgment); 28 U.S.C. sec. 1301 (jurisdiction) and 31 U.S.C. sec. 231, 232, 233, 235 (False Claims Act).

SECOND: At all relevant times, plaintiff, Marshall P. Safir, has resided in the County of Nassau, State of New York and in the Eastern District of New York. Plaintiff is a citizen of the United States and at all relevant times was a stockholder and officer of Sapphire Steamship Lines, Inc., and personal guarantor of certain of its obligations. At all relevant times, Sapphire Steamship Lines, Inc. was a Delaware corporation, having its principal of business in the County of Kings, State of New York and in the Eastern District of New York.

THIRD: Defendant, Robert J. Blackwell, is the Assistant Secretary for Maritime Affairs in the United States Department of Commerce and is the successor to James W. Gulick and Andrew Gibson, former acting Maritime Administrators for the Maritime Administration, United States Department of Commerce. The Maritime Administration has offices at 26 Federal Plaza, New York, New York.

FOURTH: Defendant, James S. Dawson, Jr., was during the relevant period and still is the Secretary of the Maritime Subsidy Board, Maritime Administration, United States Department of Commerce. The Maritime Administration has offices at 26 Federal Plaza, New York, New York.

FIFTH: Defendant, Juanita Kreps, is the Secretary of Commerce of the United States, and is the successor to C.R. Smith, Maurice Stans, Peter Peterson, Frederick Dent, and Elliot Richardson, former Secretaries of Commerce.

SIXTH: Defendants, American Export Isbrandtsen Lines, Inc., American President Lines, Ltd., Bloomfield Steamship Company, Farrell Lines, Inc., Prudential Grace Lines, Inc., Lykes Bros. Steamship Company, Inc., Moore-McCormack Lines, Inc., Prudential Steamship Co., Inc. and United States Lines, Inc. ("the defendant carriers") are contracting American Flag common carriers which at all relevant times herein have received and except for Bloomfield Steamship Company and United States Lines, Inc. are now receiving operating differential subsidies within

the meaning of Section 810 of the Merchant Marine Act of 1936 (46 U.S.C. §1227).

SEVENTH: Atlantic and Gulf American Flag Berth Operators (hereinafter referred to as "AGAFBO") was at all relevant times herein a conference of American Flag Berth Operators organized to negotiate with the Military Sea Transport Service (hereinafter "MSTS") of the United States Department of Defense (hereinafter "DOD"), which has been approved under Section 15 of the Shipping Act of 1916, as amended (46 U.S.C. §814). Each of the defendant carriers was, during the relevant period herein, a member of AGAFBO.

EIGHTH: On May 6, 1965, the Federal Maritime Commission (not to be confused with the Maritime Administration or the Maritime Subsidy Board of the Maritime Administration) instituted an investigation of the practices surrounding the procurement of ocean transportation of United States military cargoes. The Commission named as respondents AGAFBO (Atlantic and Gulf American Flag Berth Operators), TPAFBO (Trans-Pacific American Flag Berth Operators), WCAFBO (West Coast American Flag Berth Operators), their respective member lines and Sapphire Steamship Lines, Inc., Liberty-Pac International Corp., and Pioneer Overseas Service Corp. The Military Sea Transport Service (MSTS), General Services Administration, Household Goods Forwarders Assn. of America, Inc., and Toledo-Lucas County Port Authority intervened. Beginning September 28, 1965, Examiner C.W. Robinson held hearings totaling 61 days in Washington, San Francisco, and New York, and served an initial decision on December 15, 1966. The

Commission heard oral argument on exceptions and replies to exceptions on May 3, 1967.

NINTH: On December 12, 1967, the Federal Maritime Commission filed its decision, Docket No. 65-13, in which it found and concluded as follows concerning the rates of the Atlantic and Gulf American Flag Berth Operators (AGAFBO):

> 1. The rates of AGAFBO, prior to the entry of Sapphire into the trade, and the rates of WCAFBO were not contrary to Section 18(b)(5).
>
> 2. AGAFBO's rates, which were reduced to an admittedly noncompensatory and unreasonable level in an attempt un-fairly to compete with Sapphire, violated Section 15 by knowingly setting rates which were contrary to Section 18(b)(5) and which were detrimental to commerce and contrary to the public interest.

TENTH: The foregoing decision and findings of the Federal Maritime Commission are now final, no timely review having been sought by any of the carriers involved.

ELEVENTH: At all relevant times involved in the findings of the Federal Maritime Commission referred to hereinabove, Sapphire Steamship Lines, Inc. operated as a nonsubsidized common carrier by water exclusively, employing vessles registered under the laws of the United States, on established trade routes from and to United States ports. It was in direct competition with the members of AGAFBO and was harmed by the illegal payment of subsidies to the mem-

bers of AGAFBO who are not entitled to receive them. Subsidies are provided for by 46 U.S.C. §§1171 through 1182 inclusive, and §§1191 through 1204 inclusive, and are referred to as operating-differential subsidies. There are also subsidies referred to as construction differential subsidies, provided for by 46 U.S.C. §§1151 through 1161.

TWELFTH: Section 810 of the Merchant Marine Act (46 U.S.C. §1227) provides as follows:

> "SEC. 1227. AGREEMENTS WITH OTHER CARRIERS FORBIDDEN; WITHHOLDING SUBSIDIES; ACTIONS BY INJURED PERSONS FOR DAMAGES.
>
> It shall be unlawful for any contractor receiving an operating-differential subsidy under Sections 1171-1182 of this title or for any charterer of vessels under Sections 1191-1204 of this title to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

> No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

THIRTEENTH: In accordance with Attachement I hereto, the members of AGAFBO received $227,686.369.33 during the period of violation.

FOURTEENTH: On December 21, 1967, the plaintiffs requested the Maritime Administration to desist from making any further payments of subsidies of any kind and to take appropriate action to recover subsidies which had been paid from March 25, 1965 to members of AGAFBO on the grounds that in the specific instance of the Sapphire findings by the Federal Maritime Commission a violation of Section 15 of the Shipping Act of 1916 could be proven to be a violation of Section 810 of the M.M.A. of 1946 as well.

FIFTEENTH: Although defendants stated that they would take whatever action was deemed appropriate, no action was taken to either request documentary proof of

plaintiff Safir and others filed the original complaint in this Court to compel agency action on the grounds that a violation of the Shipping Act sec. 15 was in the circumstances of the Sapphire case, a violation which required the invocation of sec. 810.

SEVENTEENTH: This Court dismissed the complaint for failure to state a claim on which relief could be granted, and was reversed in Safir v. Gibson 417 F.2d 972. The Court of Appeals held that the construction differential and operating differential subsidy payments subject to recovery were those paid out during a period of eleven months in 1965-1966.

EIGHTEENTH: Immediately following this reversal and remand, the Maritime Administration instituted an investigation posing the question whether sec. 810 had been violated.

NINETEENTH: Dissatisfied with this procedure, plaintiff Safir herein moved this Court once again for injunctive relief, the Court denied stating that the Court of Appeals in Safir v. Gibson supra had not found that a violation of sec. 15 was a violation of sec. 810 in the Sapphire case.

TWENTIETH: On February 26th, 1970, in Safir v. Gibson 432 F.2d 137, the Court of Appeals reversed, holding that collateral estoppel would exist in this case subject only to proof that the AGAFBO Lines were receiving operating differential subsidies at the time of the violation and that the carrier adversely affected was "a citizen of the United States who operates a common carrier by water, exclusively employing

vessels registered under the laws of the United States on any established routes from and to a United States port or ports.

TWENTY-FIRST: The MSB hearing in Docket 243 was reinstituted to give collateral estoppel effect to a finding of violation subject to this proof. And on February 16th, 1971, at a prehearing conference, plaintiff Safir offered to give this proof to the government, and on March 16th, 1971, May 6th, 1971 and June 15th, 1971, gave sworn testimony and documentary evidence to prove that the criteria had been met.

TWENTY-SECOND: On May 6th, 1971, Administrative Law Judge Paul Pfeiffer informed the respondent lines that a prima facie case for a violation of sec. 810 had been made which would call for the recovery of subsidies paid during or allocable to the period of violation.

TWENTY-THIRD: In spite of the above and immediately thereafter, commencing on or about May 27th, 1971 and through June 12th, 1971, the violating carriers submitted vouchers representing the balance amounts of claims for subsidies allocable to the 1965-66 period, and these were paid out until this Court issued an order restraining the Maritime Subsidy Board from such disbursement unless adequate measures were taken to protect the United States. Plaintiff alleges that these carriers well knew these claims were false.

TWENTY-FOURTH: On April 16th, 1973, MSB issued its final decision that all carrier defendants herein had violated sec. 810. It also held it had discretion to

mitigate subsidy recovery. The defendant carriers petitioned the Secretary of Commerce for review and Secretary Dent affirmed the finding of violation against all of them. He further mitigated the penalties, however. Neither decision included a referral to the Department of Justice for prosecution under the False Claims Act.

TWENTY-FIFTH: At all times during S243, and since 1972 ir an action to escrow the proceeds of ship sales in this docket 68-C 643, all defendants knew that plaintiff Safir intended to exercise his rights under 31 USC 231 et seq, if the Secretary of Commerce sought recovery in an amount less than demanded in the original complaint herein.

TWENTY-SIXTH: That in the original complaint, plaintiff Safir demanded judgment for the following relief:

> "C. That an order be issued directing the defendants to commence appropriate legal action to recover the subsidy payments heretofore illegally made...".

TWENTY-SEVENTH: That Articles II-30 and II-31 of each operating differential subsidy contract trigger the defaults and termination terms upon the finding of such violation.

TWENTY-EIGHTH: That Article II-30(a) of the operating differential subsidy agreement provides that the operator furnish a bond--"...to be conditioned upon the true and faithful performance of all and singular covenants and agreements of the operator

contained in this agreement, and particularly upon the refund by the operator to the United States of any amount by which payments on account of the operating differential subsidy, including wage subsidy, shall exceed the amount determined to be payable to the operator under the audits being made pursuant to Article II-20 of this agreement...". -- "The amount of such bond, or of United States government securities furnished in lieu thereof shall be adjusted from time to time...". Plaintiff alleges that these securities and deposits are inadequate for the recovery sought herein.

TWENTY-NINTH: That Article II-30(b) states as follows:

> "b) In the event the operator is unable for any reason to furnish either the bond or pledge the securities in accordance with Article II-30(a), the United States shall withhold such subsidy payments as it deems appropriate to secure performance of this agreement and provide protection against overpayments of operating differential subsidy."

Plaintiff alleges that this has not been done.

THIRTIETH: That Article II-31 specifically reserves the government's rights to proceed to recover under the Act (46 USC 1227) and other pertinent statutes. Plaintiff alleges that 31 USC 231 et seq is the pertinent statute in this instance.

THIRTY-FIRST: On various dates commencing in or about March 1965, each of the defendant carriers submitted vouchers for subsidy payments to the Maritime Administration pursuant to operating-differential subsidy agreements between such defendant carriers and the United States.

THIRTY-SECOND: On various dates commencing in or about March 1965, the defendant carriers, other than Bloomfield Steamship Company, submitted vouchers for subsidy payments to the Maritime Administration pursuant to construction-differential subsidy agreements under Title V of the Merchant Marine Act and on vessels acquired under the Merchant Ship Sales Act of 1946, pursuant to Section 704 of the Merchant Marine Act, between the defendant carriers and the United States.

THIRTY-THIRD: Each of the foregoing agreements provided in part substantially as follows:

II-15. Preference and Conference Agreements

* * *

(b) The Operator agrees not to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any

established trade route from and to a United States port or ports.

* * *

II-18. (e) No payment or subsidy of any kind shall be paid to the Operator if it shall violate the provisions of Article II-15(b) of this Agreement.

* * *

II-19. Limitations upon Subsidy Payments. Notwithstanding any other provision of this Agreement, no payment of operating-differential subsidy shall be made with respect to any of the following:

* * *

(c) Expenses incurred while the Operator is for any reason ineligible for the accrual of a subsidy under the Act;

(d) Expenses incurred in connection with a voyage made by any subsidized vessel during any period when such vessel is for any reason not eligible for a subsidy under the Act;

* * *

II-22 Events of Default. The following shall constitute events of default under this Agreement.

(a) Any material misrepresentation wilfully or negligently made by the Operator in connection with this Agree-

ment whether before or after execution hereof and whether made in an application, report, affidavit, or otherwise, or any wilful or negligent failure by the Operator to disclose material information.

(b) The occurrence of any event causing the Operator to be ineligible for an operating-differential subsidy.

THIRTY-FOURTH: Each of the vouchers submitted by the defendant carriers pursuant to such agreements included an affidavit which states in substance as follows:

I, ----------,
(name of company official)
being duly osworn, depose and say, that I am ----------
(title)
of the ---------- (here-
(Operator)
in referred to as the "Operator"), and as such am familiar with (a) provisions of the Operating-Differential Subsidy Agreement, Contract No. ----------, dated as of ---------- as amended, to which the Operator is a party; and (b) the regulations governing the payment of operating-differential subsidy for bulk cargo vessels, Part 252, Title 46, C.F.R.; and (c) the operation of the vessels covered by said Agreement and regulations; and (d) the accounts, books, records, and disburse-

ments of the Operator relating to such operation.

Referring to the public voucher dated ----------, covering voyages terminated during the periods commencing ---------- and ending ---------- and attached submitted by said Operator concurrently herewith for a payment on account in the sum of ---------- -under said Agreement. I further depose and say that, to the best of my knowledge and belief, the Operator has fully complied with the terms and conditions of said Agreement and regulations, applicable orders, rulings and provisions of the Merchant Marine Act, 1936, as amended, and is entitled, under the provisions of said Agreement and regulations, orders and rulings, applicable thereto, to the amount of the payment on account requested.

THIRTY-FIFTH: Each of the foregoing vouchers was false in that each of the defendant carriers well knew that it had not complied with the paragraph designated II-15(b) above in its agreement with the United States, it knew that it was not entitled to any payment or subsidy of any kind, in view of the provisions of II-18(e) of such agreement, and it knew that events of default had occurred under paragraph II-22 of such agreement in that it had made material misrepresentations, had failed to disclose material information and was, in fact, ineligible for subsidy under the express terms of its agreement. Moreover, it well knew that it had violated §810 of the Merchant Marine Act (46 U.S.C. §1227) and,

accordingly, that it was not entitled to receive the subsidy for which it submitted vouchers.

THIRTY-SIXTH: Pursuant to such agreement, each of the defendant carriers was required to submit and, upon information and belief, did submit an annual accounting, including an affidavit by its chief financial officer that it had fully complied with all of the terms and conditions of its agreement in the manner and at the times therein required. Upon information and belief, said defendant carriers well knew that it had not complied with the paragraph of such agreement designated II-15 above.

THIRTY-SEVENTH: The total amount of subsidy payments received by these defendant carriers in response to false vouchers is presently unknown to plaintiff. The total amount of payments paid during the relevant period such defendant carriers were in violation of sec. 810 of the Merchant Marine Act (46 U.S.C. sec. 1227) is as set forth in Attachment I, annexed hereto. The exact amount of subsidy payments attributable to the relevant period is presently unknown to plaintiff.

WHEREFORE, the United States ex rel Marshall P. Safir and Plaintiff Safir demand judgment for the following relief:

A. A judicial declaration adjudicating that all carrier defendants who were found to have violated sec. 810 of the Merchant Marine Act of 1936 during an eleven-month period and who filed claims for payment of both construction and operating subsidies during that period or soon thereafter

violated 31 U.S.C.231 as well by the submission of false vouchers knowing them to be false.

B. A judicial declaration adjudicating that all of the carrier defendants who were found to have violated sec. 810 during an eleven-month period in 1965-66, and who filed final segments of those vouchers for operating differential subsidies in 1971, violated 31 U.S.C.231 as well when the United States paid false claims submitted by the defendant carriers who knew them to be false.

C. That the Secretary of Commerce be ordered to declare the defendant carriers in default of their ODS agreements.

D. That the Secretary forthwith be ordered to protectively attach the capital construction accounts of the violating carriers and all other bonds and sureties as provided in Article II-30 ODSA.

E. That the Secretary be ordered to offset all subsidies accrued but unpaid due the defendant carriers herein.

F. That the Secretary be ordered to withhold all current payments pending the marshalling of funds necessary to make the government whole for the subsidies illegally paid.

G. That judgment be granted in favor of the United States for twice the amount of construction and operating differential subsidy payments received by the defendant carriers, pursuant to false vouchers as aforesaid, plus the statutory amount

of two thousand dollars ($2,000.) for each false voucher, and that plaintiff be awarded costs and disbursements including an allowance pursuant to the provisions of 31 U.S.C. 232 c(2).

And for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ Marshall P. Safir

MARSHALL P. SAFIR,
41 Flatbush Avenue
Brooklyn N. Y. 11027
Tel. No. 858-2700

Dated: September 13th, 1977.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

MARSHALL P. SAFIR,
Plaintiff,

- against -

AFFIDAVIT

68 Civ. 643
(JFD)

ROBERT J. BLACKWELL, Assistant Secretary for Maritime Affairs, United States Department of Commerce, Successor to and Substituted for James W. Gulick and Andrew Gibson, formerly Acting Maritime Administrators, James S. Dawson, Secretary, Maritime Subsidy Board, Maritime Administration, United States Department of Commerce, JUANITA KREPS, Secretary of Commerce of the United States, Successor to and Substituted for C.R. Smith and Maurice Stans, former Secretaries of Commerce,

Defendants,

AMERICAN EXPORT ISBRANDTSEN LINES, INC., AMERICAN PRESIDENT LINES, LTD. LYKES BROS. STEAMSHIP COMPANY, INC., MOORE-McCORMACK LINES, UNITED STATES LINES, INC., FARRELL LINES, INC., BLOOMFIELD STEAMSHIP CO., PRUDENTIAL GRACE LINES, INC. and PRUDENTIAL STEAMSHIP CO., INC.,

Carrier Defendants.
----------X

UNITED STATES OF AMERICA,
ex rel MARSHALL P. SAFIR and
MARSHALL P. SAFIR,
Plaintiffs,

- against - 77 Civ. 1093 (JFD)

AMERICAN EXPORT LINES, INC.,
ET AL.,
Defendants.
----------X

STATE OF NEW YORK)
COUNTY OF KINGS)

MARSHALL P. SAFIR, being duly sworn, deposes and says:

1. On or about June 24, 1968, the first above captioned action was initiated by filing a complaint in this Court. In essence, the action sought to require the responsible officers of the United States Government to discontinue subsidy payments to the following carriers:

American Export Isbrandtsen Lines, Inc.
American President Lines, Ltd.
Bloomfield Steamship Co.
Farrell Lines Incorporated
Prudential Grace Lines, Inc.
Lykes Bros. Steamship Co., Inc.
Moore-McCormack Lines, Inc.
Prudential Steamship Co., Inc.
United States Lines, Inc.

and to recover subsidy payments already made on the ground that such carriers had violated Section 810 of the Merchant

Marine Act (46 U.S.C. Sec. 1227) by engaging in practices in concert which were unjustly discriminatory or unfair to Sapphire Steamship Lines, Inc.

2. At the time I filed the 1968 action, I had not made available to the United States Government, and the United States Government did not have in its possession, all of the evidence and information nec-essary to establish that such carriers had violated Sec. 810 of the Merchant Marine Act. Most significantly, Sapphire Steamship Lines status as a common carrier on established trade routes from and to the United States.

3. Early in 1970, the above carriers intervened in the action I had instituted to seek reconsideration of the decision of the Court of Appeals holding that the Secretary of Commerce was estopped from reconsidering the Federal Maritime Commission's findings of fact in concluding that the carriers had violated Section 15 of the Shipping Act and that the Commission's findings would constitute a violation of Section 810 of the Merchant Marine Act, subject only to proof that the carriers were receiving operating differential subsidies during the relevant time and that plaintiffs were citizens of the United States who could meet certain statutory criteria. Safir v. Gibson, 432 F2d 137 (2d Cir. 1970). They have since participated as defendants in the proceeding. From 1969 on, the defendant carriers have participated as respondents in Maritime subsidy

Board proceedings. They have also participated as intervening defendants in related proceedings in the District of Columbia.

4. On various dates in 1971, in connection with hearings (MSB Docket S-243) before the Maritime Subsidy Board, I made available to the government through Michael J. McMorrow, Esq., of the Federal Maritime Administration, all the information in my files and the files of Sapphire SS Lines; and, as the moving party in the investigation, participated throughout the hearings which took two and onehalf years.

During those hearings, Mr. McMorrow stated "...in the present case, and notwithstanding the inclusion of the requirements of Sec. 810 of the act in each and every subsidy agreement, the respondents did not request contractual permission but proceeded to effect rate reductions and to wage battle before the F.M.C. Once the board was involved, and only through the behest of Mr. Safir, the respondents firmly deny to this date that rate actions are subject to the section. The distinctions are all too apparent. What remains is a clear provision of the subsidy contract and an explicit statute both binding on the respondents as of the day they first began, without any overture to the Maritime Administration, the unlawful behavior." (emphasis added).

5. As a result of my oral and documentary evidence and later participation in oral argument before the Board, the criteria for the finding of a violation as contoured in Safir v. Gibson, 1970 supra was met. On April 16th, 1973, the offending carriers were found to have violated the act by the MSB and this finding was affirmed by the Secretary of Commerce in September 1974.

6. The hearings before the Maritime Administration, therefore, were an outgrowth of the proceedings which I initiated in 1968. Even prior to the commencement of such hearings, I had expended considerable sums in the prosecution of the 1968 action for attorneys' fees and other costs and expenses. Also my own personal resources were seriously depleted by the need to honor various guarantees and other investments and obligations which I had assumed in connection with Sapphire Steamship Lines. Thus, as a direct result of the predatory action by the above named carriers, I was forced to continue this action on behalf of the United States without counsel. In truth, the United States has always been the real party plaintiff in this case. Although the 1968 complaint was not formally amended to allege a cause of action under the False Claims Act (31 U.S.C. 231 et seq.) prior to the time I provided the government with the information necessary for a finding of violation of Sec. 810 of the Merchant Marine Act, I had made

known orally and in writing on numerous occasions to the government and to the offending carriers my contention that, irrespective of any inclination towards leniency on the part of the responsible government officials, I had the right, on behalf of the United States, to enforce its full legal rights under its subsidy contracts with these carriers and that I had the right to remuneration in the nature of a qui tam allowance for my services on behalf of the government. I understand that amendments adding additional claims for damages have uniformly been held to relate back and not to introduce new causes of action (Vann v. United States, 420 F.2d 968 (ct. Cl. 1970); J.L. Simmons Company, Inc. v. United States 412 F.2d 1369 Ct. Cl. 1969); Tabacalera Cubana v. Faber Coe & Gregg, Inc., 379 F. Supp. 772 (S.D.N.Y. 1974); and most significantly United States v. Templeton, 199 F. Supp. 179 (E.D. Tenn. 1961).

7. Indeed, it is only because the government agency, upon information and belief, avoided the normal course of instituting a legal action for breach of the subsidy contracts by adopting the anomalous procedure of holding administrative hearings to decide whether to sue and then settling before suit was instituted that they in effect, avoided the whole issue of whether the carriers filed false vouchers for subsidies.

8. As alleged in the proposed amended complaint, each of the defendant carriers had entered into subsidy contracts with the government prior to its violation of the Merchant Marine in which it expressly agreed (in haec verba with Sec. 810 of the Merchant Marine Act) that it would not

> "engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water, exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports."

Each had expressly agreed that no payment or subsidy of any kind would be made if it violated the above quoted provision. Each voucher which it submitted for a subsidy payment was accompanied by the affidavit of an officer swearing that he was familiar with the terms of the agreement, that the carrier had fully complied with them and was entitled to the payment requested. The subsidy payments to particular carriers during relevant periods were a part of the record before the Maritime Subsidy Board. Thus, the conduct and transactions which were in issue before the Maritime Subsidy Board as a result of

the 1968 complaint and are now res judicata are the same as which form the basis for the proposed amended complaint. The amendment conforms the pleadings to the proof and makes appropriate changes in the complaint to reflect the chronology of events and additional claims for damage under the False Claims Act (31 U.S.C. Sec. 231 et.seq.).

6. On May 26th, 1977, I filed a complaint and affidavit in this Court (77) (Civ. 1093) which asserted a claim against the defendant shippers under the False Claims Act (31 U.S.C. 231 et. seq.). This action was filed to foreclose technical statute of limitations defenses and plaintiff informed the Court that before or soon after the resolution of certain issues related hereto in the Supreme Court of the United States, that this amended complaint would be filed. The proposed amended complaint incorporates this asserted claim. A notice of pendency was accordingly sent to the Attorney General, who in June of this year declined to enter an appearance herein, waiving the government's rights to prosecute under 31 U.S.C. Sec. 232(c).

7. Since common issues of fact and law are involved, the two proceedings should be consolidated.

WHEREFORE, I respectfully request leave to serve the attached amended complaint in the 1968 action and for consolidation of the above proceedings.

/s/ Marshall P. Safir
MARSHALL P. SAFIR

Sworn to before me this
13 day of September, 1977.

Notary Public

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 388

MARSHALL P. SAFIR and SAPPHIRE STEAMSHIP LINES, INC.,
Petitioners,

vs.

ANDREW GIBSON, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY AND SUPPLEMENTAL BRIEF

On September 17, 1970, U. S. District Judge Dooling signed the order and memo to counsel explaining the order, which are set out in the addendum hereto.

The order and memo coupled with the brief of the U. S. Government respondents are ample proof of the judicial and administrative attrition that petitioners will be subjected to if this Court does not now grant certiorari.

After five (5) long years, it is not premature for the Court to grant certiorari. On the contrary, the time is overdue for the authoritative review which only the Supreme Court can provide for this important and meritorious cause.

Our position as set forth on page 14 of the Petition for Certiorari, is fully borne out by the tortuous instructions of an able District Court Judge in trying to implement the first phase of the Mandate of the Second Circuit Court of Appeals.

We respectfully pray that the Petition for Certiorari be granted.

Dated: New York, New York,
September 28, 1970.

Respectfully submitted,

ISADORE B. HURWITZ
Attorney for Petitioners,
1780 Broadway,
New York, New York 10019.
Tel. No. (212) 757-1053

Memo to Counsel

Re: *Safir* v. *Gibson* 68 C 643

The second draft, sent out September 14, has been signed.

The accompanying order does not require that the "considered decision on grounds consistent with the statute" whether or not to seek recovery shall be made by the Maritime Administration wholly internally, and without the making of such record (made on notice and with opportunity to present matter relevant to the decision) as the Administration considers appropriate. It is not intended, either, to mandate a severance on the part of the Administration of its task, as fixed by the decisions of the Court of Appeals, into two distinctly compartmentalized sets of acts, such as, *first,* a process of decision, constituting an exercise of an entirely internal Administration discretion, viewed as an act of Government, about whether or not to seek recovery of subsidies paid during the period of violation, and then, if the decision is to seek recovery, *second,* a distinct process of decision made after an adjudicatory hearing to determine the carriers from whom and the amounts in which such recovery should be sought.

If the Administration's task does involve two aspects or phases of decision making, the order is not intended to prescribe the precise modus operandi in arriving at the final result.

Brooklyn, New York
September 17, 1970.

JOHN F. DOOLING
U. S. D. J.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

ORIGINAL Complaint
68C643

The above named plaintiffs, for their complaint against the above named defendants, by their attorney Isadore B. Hurwitz, allege:

First: This action seeks judicial review to compel both agency action being unlawfully withheld and agency action being unlawfully continued, as hereinafter appears. The agency involved is the Secretary of the United States Department of Commerce, the Acting Maritime Administrator, Maritime Administration of the United States Department of Commerce and the Secretary of the Maritime Subsidy Board, Maritime Administration, United States Department of Commerce. This action arises and this Court has jurisdiction by virtue of the following statutes: 46 U. S. C. 1227 (Merchant Marine Act of 1936); 5 U. S. C. 702, 703, 704, 706 (the agencies generally); 28 U. S. C. 2201, 2202 (Declaratory Judgment); 28 U. S. C. 1361 (Jurisdiction); 28 U. S. C. 1337.

Second: Plaintiff Sapphire Steamship Lines, Inc. (an American Flag Carrier referred to as "Sapphire") is a corporation organized and existing under the laws of the State of Delaware, and had its principal place of business at 41 Flatbush Avenue, Brooklyn, New York.

Complaint for Review of Agency Action, Etc.

Third: Plaintiff Marshall P. Safir is a natural person residing at 8 Soundview Lane, Great Neck, New York, and is a citizen and taxpayer of the United States and stockholder and officer of Sapphire Steamship Lines, Inc.

Fourth: Arnold Weissberger is a natural person residing at 1764 Bay Boulevard, Atlantic Beach, New York, and is a citizen and taxpayer of the United States and stockholder and officer of Sapphire Steamship Lines, Inc.

Fifth: Defendant James W. Gulick is the Acting Maritime Administrator for the Maritime Administration, United States Department of Commerce. The Maritime Administration has offices at 45 Broadway, New York City.

Sixth: Defendant James S. Dawson, Jr. is the Secretary of the Maritime Subsidiary Board, Maritime Administration, United States Department of Commerce. The Maritime Administration has offices at 45 Broadway, New York City.

Seventh: Defendant C. R. Smith is the Secretary of Commerce of the United States ("The Secretary").

Eighth: American Export Isbrandtsen Lines, Inc., American President Lines, Ltd., Bloomfield Steamship Company, Farrell Lines Incorporated, Grace Line, Inc., Lykes Bros. Steamship Co., Inc., Moore-McCormack Lines, Inc., Prudential Steamship Corporation, and United States Lines Company are contracting American Flag common carriers which at all relevant times herein have received and are now receiving operating differential subsidies within the meaning of 46 U. S. C. 1227.

Ninth: Atlantic & Gulf American Flag Berth Operators (hereinafter referred to as "AGAFBO"), is a conference

of American Flag Berth Operators organized to negotiate with the Military Sea Transport Service (hereinafter "MSTS") of the United States Department of Defense (hereinafter "DOD") which has been approved under Section 15 of the Shipping Act, 1916 (46 U. S. C. Section 814). Each of the common carriers listed in paragraph Eighth above was, during the relevant period herein, a member of AGAFBO.

Tenth: On May 6, 1965 the Federal Maritime Commission (not to be confused with the Maritime Administration or the Maritime Subsidy Board of the Maritime Administration) on its own motion instituted an investigation of the practices surrounding the procurement of ocean transportation of United States military cargoes. The Commission named as respondents AGAFBO (Atlantic and Gulf American-Flag Berth Operators), TPAFBO (Trans-Pacific American-Flag Berth Operators), WCAFBO (West Coast American-Flag Berth Operators), their respective member lines and Sapphire Steamship Lines, Inc., Liberty-Pac International Corp., and Pioneer Overseas Service Corp. The Military Sea Transportation Service (MSTS), General Services Administration, Household Goods Forwarders Assn. of America, Inc., and Toledo-Lucas County Port Authority intervened. Beginning September 28, 1965, Examiner C. W. Robinson held hearings totaling 61 days in Washington, San Franciso, and New York and served an initial decision on December 15, 1966. The Commission heard oral argument on exceptions and replies to exceptions on May 3, 1967.

Eleventh: On December 12, 1967 the Federal Maritime Commission filed its decision, Docket No. 65-13, in which

it found and concluded as follows concerning the rates of the Atlantic and Gulf American-Flag Berth Operators (AGAFBO):

> 1. The rates of AGAFBO, prior to the entry of Sapphire into the trade, and the rates of WCAFBO were not contrary to section 18(b)(5).
>
> 2. AGAFBO's rates, which were reduced to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire were so unreasonably low as to be detrimental to the commerce of the United States contrary to the provisions of section 18(b)(5).
>
> 3. AGAFBO, by reducing its rates to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire, violated section 15 by knowingly setting rates which were contrary to section 18(b)(5) and which were detrimental to commerce and contrary to the public interest.

Twelfth: The foregoing decision and findings of the Federal Maritime Commission are now final, no timely review having been sought by any of the carriers involved.

Thirteenth: That at all relevant times involved in the findings of the Federal Maritime Commission referred to hereinabove, Sapphire Steamship Lines, Inc. operated as a nonsubsidized common carrier by water exclusively, employing vessels registered under the laws of the United States, on established trade routes from and to United States ports. It was in direct competition with the members of AGAFBO and was harmed by the illegal payment of subsidies to the members of AGAFBO who are not

entitled to receive them. Subsidies are provided for by 46 U. S. C. 1171 through 1182 inclusive and 1191 through 1204 inclusive, and are referred to as operating differential subsidies. There are also subsidies referred to as construction differential subsidies, provided for by 46 U. S. C. 1151 through 1161.

Fourteenth: 46 U. S. C. 1227 provides as follows:

> "Sec. 1227. Agreements With Other Carriers Forbidden; Withholding Subsidies; Actions by Injured Persons for Damages.
>
> It shall be unlawful for any contractor receiving an operating-differential subsidy under sections 1171-1182 of this title or for any charterer of vessels under sections 1191-1204 of this title to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.
>
> No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect

to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Fifteenth: Upon information and belief, the members of AGAFBO have received subsidies of both kinds, totaling in excess of $600 million and are continuing to receive subsidies in violation of the statute, 46 U. S. C. 1227.

Sixteenth: On December 21, 1967 the plaintiffs requested the defendants to desist from making further payments of subsidies of any kind and to take appropriate action to recover subsidies which had been paid from March 25, 1965 to members of AGAFBO.

Seventeenth: Upon information and belief, that although the defendants stated they would take whatever action was deemed appropriate, no action whatever has been taken either to recover whatever subsidies had already been paid or to refrain from continuing to make further subsidy payments.

Eighteenth: The action and lack of action of the Secretary of the United States Department of Commerce is implemented by defendants James W. Gulick and James S. Dawson, Jr. in their official capacities. These actions and implementations thereof are agency actions subject to judicial review and appropriate judicial declaration and relief.

WHEREFORE, plaintiffs demand judgment for the following relief:

A. A judicial declaration adjudicating that the making of any subsidy payment of any kind out of the funds of

the United States to the carriers who were members of AGAFBO during the time period covered by the decision of the Maritime Commission Docket No. 65-13, is illegal in violation of 46 U. S. C. 1227;

B. That an order of prohibition be issued prohibiting and enjoining the defendants from continuing to make such subsidy payments;

C. That an order be issued directing the defendants to commence appropriate legal action to recover the subsidy payments heretofore illegally made;

D. That plaintiffs have such other and further relief as may be just and appropriate, together with the costs and disbursements of the action.

ISADORE B. HURWITZ
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

----------X

MARSHALL P. SAFIR,

Plaintiff,

- vs -

JUANITA M. KREPS,
Individually and as Secretary
of Commerce, et al.,

Defendants.

----------X

Civil Action
No. 74-1474
74-1788
75-0077

NOTICE
OF MOTION

PLEASE TAKE NOTICE that in accordance with the order of Magistrate Honorable Jean Dwyer of this Court January 18, 1978, plaintiff Marshall P. Safir has filed a Motion for Further Discovery based on the information contained in the deposition of September 27, 1977 in New York City (Att. A) answerable 15 days from the date of this filing.

WHEREAS,

1. Plaintiff Safir has submitted an affidavit hereto showing cause for further discovery in the "unexplained inconsistencies" of the Secretary of Commerce's decision in Docket S243;

2. Plaintiff Safir's aforementioned deposition attached hereto as Attachement A would provide a basis for further discovery relevant to conspiracy to unduly influence the decision making process and to delay same.

3. And where this undue influence may have contributed to the fraudulent concealment of a violation of the False Claims Act 31 U.S.C. 231, 232, 235.

4. And were evidence relating to such conduct can reasonably be deduced to be contained in certain specific presidential conversations.

5. And where the procedure for such access to the presidential tapes has been advanced by this Court in an earlier case Dellums vs. Powell, 561 F. 2d 242 (1977) to adequately protect privacy, plaintiff moves this Court for a subpoena duces tecum to the office of the General Services Administrator, and for the appointment of an archivist by the Court to review all relevant tapes produced by this subpoena in connection with the discussions held and actions taken in regard to the Safir case from January 3, 1969 to the day the ex-President resigned.

WHEREFORE, plaintiff prays that this motion be granted and for such other relief the Court may deem appropriate to further these objectives.

RESPECTFULLY SUBMITTED,

/s/ Marshall P. Safir

February 15, 1978

Marshall P. Safir
41 Flatbush Avenue
Brooklyn, New York
Tel. No. (212)858-2700

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

----------X

MARSHALL P. SAFIR,

Plaintiff,

- vs -

JUANITA M. KREPS, Individually and as Secretary of Commerce, et al.,

Defendants.

Civil Action No. 74-1474 74-1788 75-0077

AFFIDAVIT AND MOTION FOR SUBPOENA OF PRESIDENTIAL TAPE RECORDINGS

----------X

STATE OF NEW YORK)
SS:
COUNTY OF KINGS)

MARSHALL P. SAFIR, being duly sworn, deposes and says:

On January 18, 1978 at the hearing before the Honorable Jean Dwyer, Magistrate of the Federal District Court of the District of Columbia Circuit, this affiant placed on the record a summary of a deposition he gave on September 27, 1977 in New York City and excerpts of a hearing before Judge John F. Dooling, Jr. of the Eastern District of New York on October 28, 1977. This material related to a corrupt arrangement entered into by the ex-President, Richard Nixon

with the defendant carriers in Docket 74-1474 to thwart this plaintiff in pursuing recovery for the United States of subsidies illegally paid out during the period of a violation of Sec. 810 of the Merchant Marine Act 1936 and the anti-trust case of Sapphire Steamship Lines against AGAFBO. This case was ultimately settled for a sum of $2,400,00.00 as a result of the actions of the firm of Winthrop, Stimpson, Putnam and Roberts acting in behalf of a creditor and who had been the spearhead of objection to a $1,600,000.00 offer of the AGAFBO group. Joseph Alioto, Esq. was anti-trust counsel for Sapphire Steamship Lines at that time and his efforts to arrange the settlement at the lower figure was the subject matter of a decision in the Second Circuit in the matter of Sapphire Steamship Lines and J. Reed Smith vs. Winthrop, Stimpson, Putnam and Roberts cited as 509 F2D 242 Att C Mr. Alioto is now Chairman Of The Board of a Pacific Far East Lines, Inc. an American Flag ocean carrier who has in recent weeks filed for protection under Chapter 11 of the bankruptcy laws.

In the deposition attached hereto the disclosures set forth a sum of $7,000.000.00 that was to be set aside to cover the objectives of Mr. Nixon and this group. The final settlement of the anti-trust case at the figure of $2,400,000.00 would then have left available the sum of $4,600,000.00.

Coincidentally and as a subject for further discovery under the motion which this affidavit supports, the purchase of 49 plus percent of the stock of Pacific Far East Lines by Mr. Alioto in 1974 was, upon information and belief, based on his personal guarantee of a note in the amount of $4,600,000.00 for the stock interest. At the hearing of January 18, 1977 this affiant referred to the availability of the Nixon tape recordings for civil actions based on the decision of Judge William Bryant in the case entitled "In re subpoena to compel disclosure of recorded presidential conversations" later affirmed as Dellums, et al. vs. Powell, et al., 561 F. 2d 242 (1977) Cert. Denied 98 SCR 234.

It was in this landmark decision by Chief Judge Bryant that affiant finds the support necessary to facilitate the mandate of the Court of Appeals decision in Safir vs. Kreps, D.C. Cir. 1977, 551 F. 2d 447.

It will be recalled that the Maritime Subsidy Board found that all the carrier defendants had violated Sec. 810 of the Merchant Marine Act of 1936, a finding that was the basis of this affiant's contentions in 1972 that a violation of Sec. 810 was ineluctably a violation of 31 U.S.C. 231, 232 the False Claims Act, and as stated by Judge Wright in his opinion on this remand:

> "When these detailed and plausible findings of the Board are compared to the peremptory announcement by the Secretary that the record indicates that the United States Government actively induced the rate reductions here at issue."
>
> "The conclusion is virtually compelled that the Secretary has simply failed to come to grips with the difficulty of the evidence in the record, etc."

There was a method to this rationale by the Secretary. His unsupported charge that Federal officials in the Department of Defense induced the illegal action against Sapphire Steamship Lines was an attempt to cloak the violators with immunity under a crudely contrived estoppal against a government initiated action under 31 U.S.C. 23k, 232, 235. He implicated government officials to create this estoppel (using members of a previous administration). His effort did indeed deter the Justice Department from its duty to prosecute the violators under the False Claims Act using as justification the spurious estoppel and the ongoing need to defend the Secretary of Commerce in this action in 74-1474. Affiant further submits that, as in the cases which are now on appeal in the Second Circuit of the Court of Appeals in Docket 77-6219 and 77-7626, the attempt by the Nixon administration via estoppel and non-statutory adjudication

and prior settlement to fraudulently conceal the False Claims Act violation, was the real reason for the "unexplained inconsistency" of the Secretary's actions which brought forth the critical response from Judge Wright. This fraudulent concealment must now be explored here. A full understanding of the action of several government officials including but not limited to former Secretary of Commerce Frederick Dent cannot be achieved without disclosure of specific conversations which were held between the ex-President and several individuals both in government and private sector during his White House years. The mandate of the Court of Appeals can no longer be based on a review of the records alone - the subpoena for the relevant presidential tapes is necessary.

As stated by Judge Leventhal in his opinion in Dellums vs. Powell, supra:

> "There was also a strong constitutional value in the need for disclosure in order to provide the kind of enforcement of constitutional rights that is presented by a civil action for damages at least where as here, the action is tantamount to a charge of civil conspiracy among high officers of government to deny (a class of) citizens their constitutional rights and where there has been sufficient evidentiary substantiation to avoid the inference that the demand reflects mere harassment." 561 F.2d at 247.

In this action where the standing of this plaintiff is no longer questioned there can be no bar to acess to these tapes.

If the allegations are true the ex-President would be subject to demand by the United States for judgment in the amount of the bribes, kickbacks, secret emoluments and other illegal payments allegedly made to him in connection with the Safir case either for protection against subsidy withdrawal, or subsidy recovery, or for the low anti-trust settlement.

As quoted in United States vs. Jankowitz, 553, F. 2d 538 Ct.Cl. (1976) at 547, a false claims action against a government official:

> "The counterclaim (in this case by the government) states a legally sufficient common law right of action recognized by the Supreme Court long ago 'the larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain the acquirement of an interest in conflict with his fidelity as an agent. If he takes any gift, gratuity or benefit in violation of his duties, or acquires any interest adverse to his principal without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received"

(United States vs. Carter, 217 U.S. 286, 306, 30 S.Ct. 515, 520,54 L. Ed. 769, 775 (1910).

Upon the grant of the motion to pursue discovery by the issuance of a subpoena for the Nixon tapes in this action this affiant will move this Court under Rule 15(c) of the Federal Rules of Civil Procedure for leave to amend the original complaint in 74-1474 with a new cause of action under the False Claims Act against Richard Nixon as a means of recovery of a sum approximating the amount of secret emoluments received by him in connection with this alleged fraud and conspiracy.

The 6 year statute of limitations is not a bar to the proper filing of the action as the amendment and the Notice of Pendency to the Attorney General will have been filed within 6 years of plaintiff's discovery of this fraud in 1973 (see the Safir deposition, also cf Holmberg vs. Armbrecht, 327 U.S. 392 et seq.) To the extent that Richard Nixon received salary and other benefits while allegedly betraying his trust, and where a private citizen brings an action under the False Claims Act alleging under the relevant parts of the revised statutes Sec. 3490 and 5438 as to the civil liability of the government officer, to the extent of those monies claimed from the public fisc in his behalf, he is liable for such recovery at $2,000.00 per claim and double damages for each

government voucher he endorsed and presented to his bank for payment. Affiant submits that in the Safir case the ex-President may have entered into a conspiracy to defraud the government of the United States by "aiding to obtain a payment or allowance of any false or fraudulent claim" the actual wording in the revised statutes.

By the questions raised in the Court of Appeals decision in the remand of this case and by the disclosures in the Safir deposition and in the Safir statements made in the hearing before Judge Dooling in the Eastern District on October 28, 1977 and attached hereto and on the fact that these allegations are not denied, that a strong showing can be made for discovery of specific tapes wherein discussions relating to the Safir case may have taken place. The discussion of the potential for discovery in Dellums vs. Powell, supra, pages 248, 249, closely parallels the requirements here and the need for an archivist to act as special master in accordance with the procedure suggested by the Court of Appeals in that case would be acceptable. The tapes in the possession of the General Services Administration are essential to a speedy evaluation of the alleged conspiracy. The motion for the subpoena of a selected list of presidential conversations (which it is reasonable to assume to have taken place) and the appointment of a special master to

protect the privacy of the ex-President in matters that are not relevant to this alleged conspiracy should be granted.

Sworn to before me
this 15th day of
February, 1978

/s/ Marshall P. Safir
Marshall P. Safir

U. S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
Washington, D.C. 20235

May 20, 1970

Allan I. Mendelsohn, Esq.
Glassie, Pewett, Beebe & Shanks
Federal Bar Building West
1819 H Street, N. W.
Washington, D. C. 20006

Dear Mr. Mendelsohn:

Reference is made to your letter of May 4, 1970, requesting certain information respecting subsidy payments during the period March 30, 1965 through February 28, 1966, made to nine (9) specified shipping companies.

Please find attached (Attachment I) which furnishes the information requested in sub-paragraph (1) of your letter and Attachment II, which is responsive to sub-paragraph (2) of your letter.

In keeping with established User Fees, you are respectfully requested to submit a check in the amount of $50.00, made payable to "Maritime Adm.-Commerce", to the undersigned to compensate for time spent in compiling the attached tabulations.

Sincerely,

JAMES S. DAWSON, JR.
Secretary

Attachments

Attachment I

DEPARTMENT OF COMMERCE—MARITIME ADMINISTRATION
CASH SUBSIDY PAYMENTS MADE TO SELECTED SHIPPING COMPANIES
IN THE PERIOD MARCH 30, 1965 THROUGH FEBRUARY 28, 1966

Name of Company	*Operating-Differential Subsidies*	*Construction-Differential Subsidies*	*Total Subsidies Paid*
American Export Isbrandtsen Lines, Inc.	$ 29,044,028.74	$ 344,685.73	$ 29,388,714.47
American President Lines, Ltd.	25,281,292.09	14,764,741.49	40,046,033.58
Bloomfield Steamship Company	1,384,187.53	—0—	1,384,187.53
Farrell Lines Incorporated	6,428,221.13	—0—	6,428,221.13
Grace Line, Inc.	17,213,156.03	20,120,297.83	37,333,453.86
Lykes Bros. Steamship Co., Inc.	20,017,353.25	25,702,958.78	45,720,312.03
Moore-McCormack Lines, Inc.	21,236,687.68	1,616,758.09	22,852,845.77
Prudential Lines, Inc.	2,161,538.61	7,533,671.67	9,695,210.28
United States Lines, Inc.	26,844,437.62	7,992,953.06	34,837,390.68
Totals	$149,610,302.68	$78,076,066.65	$227,686,369.33

Merchant Marine Act, 1936, 46 U.S.C. 1227

It shall be unlawful for any contractor receiving an operating- differential subsidy under sections 1171-1182 of this title or for any charterer of vessels under sections 1191-1204 of this title to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

False Claims Act - 31 U.S.C. 232

§ 232. Same; suits; procedure

(A) The several district courts of the United States, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall whereso-ever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.

(B) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States, the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be with-drawn or discontinued without the con-sent, in writing, of the judge of the court and the United States attorney, first filed in the case, setting forth their reasons for such consent.

(C) Whenever any such suit shall be brought by any person under clause (B) of this section notice of the pendency of such suit shall be given to the United States by serving upon the United States attorney for the district in which such suit shall have been brought a copy of the bill of complaint and by sending, by registered mail, to the Attorney General of the United States at Washington, District of Columbia, a copy of such bill

together with a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit. The United States shall have sixty days, after service as above provided, within which to enter appearance in such suit. If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit: Provided, That if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance with clause (B) of this section. The court shall have no jurisdiction to proceed with any such suit brought under clause (B) of this section or pending suit brought under this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: Provided, however, That no abatement

shall be had as to a suit pending on December 23, 1943, if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in possession of the Department of Justice.

§ 233. Duty of United States attorney as to such cases

It shall be the duty of the several United States attorneys for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section 231 of this title by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of $2,000, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit. R.S. § 3492; June 25, 1948, c. 646 § 1, 62 Stat. 909.

§§ 235. Limitation of suit

Every such suit shall be commenced within six years from the commission of the act, and not afterward. R.S. § 3494.

NEWSPAPER CLIPPING FROM
THE JOURNAL OF COMMERCE

Dated Tuesday, February 13, 1979

Blackwell Submits Resignation

Personal Reasons Mentioned

By ROBERT F. MORISON
Journal of Commerce Staff

WASHINGTON — Robert J. Blackwell, maritime administrator since 1972, has submitted his resignation to President Carter.

Nothing other than "personal reasons" were given for his unexpected departure.

Mr. Blackwell, 54, also gave no indication of future plans.

Mr. Blackwell, who held the triple posts of Assistant Secretary of Commerce for Maritime Affairs, Maritime Administrator, and Chairman of the Maritime Subsidy Board, was only the second to do so.

The twin jobs of administrator and Subsidy Board chairman were elevated to assistant secretary in 1970 when the basic subsidy program was broadened to include all types of carriers, not just the liner segment.

Curiously, it was this broadening of opportunity for U.S. operators that ended up as Mr. Blackwell's greatest disappointment in his seven years in the post. This was because the dry bulk segment of the fleet, for which the liberalization was intended, never came forward to take advantage of the opportunities.

His resignation was to become effective April 9.

In his letter of resignation he said he had found his 24 years in federal service, beginning as a trial lawyer in the old combined Maritime Administration-Federal Maritime Board setup, "challenging and fulfilling," although the past year has been an almost unrelieved series of problems.

He spent much of 1978 defending and explaining his agency's role in the bankruptcy of Pacific Far East Lines and then had to face a critical House subcommittee examining his agency's relationship with an industry-labor promotional group — the National Maritime Council.

Investigations of that continue. MA's role in NMC, actually, was arranged by Andrew

Gibson, Mr. Blackwell's predecessor.

Clash With McCloskey

Rep. Paul N. McCloskey, R-Calif., now minority ranking member of the House Merchant Marine Committee, clashed heatedly and frequently with Mr. Blackwell last year on a variety of matters, including the PFEL situation and a long-standing row between the two over positions on oil cargo preference.

Juanita Kreps, commerce secretary and as much Mr. Blackwell's immediate superior, issued a statement late Monday calling his decision to leave a "great loss" to her agency.

She said he had served with "distinction" and credited him with being "instrumental in modernizing and expanding the American merchant marine and greatly improving the productivity of the American shipbuilding industry."

She also credited him with the sucess of the 1972 U.S.-U.S.S.R. Maritime Agreement which he helped negotiate and has had the difficult chore of carrying out and updating, making him one of the government's most experienced negotiator with the Soviets on virtually any aspect of relationships between the two countries.

She said his "expertise, effectiveness and dedication will be sorely missed."

Speculation on a possible successor was limited and produced only one name — Peters Kryos, a former democratic congressman from Maine and currently a special counsel for the House Merchant Marine Committee.

NEWSPAPER CLIPPING FROM
THE WALL STREET JOURNAL

Dated Monday, February 12, 1979

Pacific Far East, Which Accused Rival Of Paying Rebates, Apparently Did Same

By Jim Drinkhall
Staff Reporter of The Wall Street Journal

SAN FRANCISCO—When the since-bankrupt Pacific Far East Line Inc. filed a federal antitrust suit in 1976 against R.J. Reynolds Industries Inc. and its Sea-Land Service Inc. shipping unit, charging that those companies restrained trade by paying at least $19 million in bribes, rebates and excess commissions, it apparently felt it had a strong case.

Indeed, a month before the suit was filed, the North Carolina-based tobacco, food, oil and shipping concern filed a document with the Securities and Exchange Commission admitting that it paid more than $24 million in illegal maritime rebates and political contributions between 1967 and 1976. Subsequently, Reynolds agreed to an SEC consent decree barring it from making illegal rebates and other questionable payments. Reynolds also agreed to pay a $4 million civil penalty to settle similar charges made by the Federal Maritime Commission.

But the tactic has apparently backfired on Pacific Far East. Though practically the entire file has been sealed by the court and isn't public, information obtained recently from documents and a variety of sources show that the judge in the case ruled that three lawyers for Pacific Far East and four of its executives have deceived the court and that Pacific Far East apparently also had paid rebates, which it had denied doing. The shipping concern is controlled by the family of former San Francisco Mayor Jo-

seph L. Alioto; the company's law firm, Alioto & Alioto, is controlled by the same family.

Plea-Bargaining Authority

In addition, one Pacific Far East executive was held in contempt of court and ordered to jail for refusing to answer questions about the company's rebating, and the judge ruled that Reynolds's lawyers could ask the U.S. attorney to grant immunity from prosecution to two Pacific Far East executives who allegedly have knowledge of illegal rebates.

The recently obtained information also has disclosed some details of Reynolds's rebating from its own internal investigation that have never been made public.

Officials and lawyers for both sides say they can't comment on any of the court documents because the case is pending.

Last year, San Francisco-based Pacific Far East filed for protection under Chapter 11 of federal bankruptcy law. Later in the year, however, a judge ruled that the firm must be liquidated.

Throughout the proceedings, the Alioto law firm has tried to get a copy of Reynolds's 450-page internal audit report giving details of the company's world-wide rebating in the shipping business. Eventually, the firm was allowed to see part of the report, although the judge ruled it couldn't be made public. In various motions and depositions, however, bits and pieces of its contents have emerged.

Meetings and Phone Calls

Among them is that top Reynolds executives met for a week at the Hyatt hotel in San Francisco in mid-1973 and telephoned all of their major shipping accounts, telling them that Sea-Land "was getting out of the rebate business" in its Pacific trade. Documents also show that Reynolds made a "concerted effort to avoid keeping documentation of the subject (rebating) in the domestic offices (of Reynolds)." While it appears that most of the rebates were paid outside the U.S., one filing says that Sea-

Land's "five major U.S. accounts" received rebates.

Sea-Land made "payoffs and rebates," says one document, to persons in Singapore, Hong Kong, Japan, the Phillipines, South Korea, Taiwan, Thailand and "in the Canadian trade." Much of the rebate money, one document says, was disbursed through Hang Seng Bank Ltd., Hong Kong.

In a court hearing after Pacific Far East's lawyers had been given an abridged copy of the Reynolds report, federal Judge Alfonso Zirpoli said that based upon his reading of it, "you've got a prima facie case right there . . . their report sets out certain practices, rebates and even more reprehensible practices."

Several months later, however, Reynolds's lawyers filed motions saying that Pacific Far East executives and lawyers had covered up their own rebating. In November 1978, the judge ruled that T. C. Elliott, a Pacific Far East executive was in contempt of court and ordered him to jail until he answered questions about the company's rebating. Mr. Elliott avoided jail by agreeing to answer the questions in a deposition.

A month later, Judge Zirpoli issued a strongly worded order that said that while Pacific Far East had denied it paid rebates, it was "a fradulent position." In addition, said the judge, a meeting in late 1977 of Pacific Far East executives and lawyers, including two of Mayor Alioto's sons, was held to discuss the company's past rebating. Following that meeting, Pacific Far East continued to make representations that there hadn't been any rebating prior to the filing of the suit, the judge said. That meeting, he continued, "had as its purpose or effect the furtherance of a crime or fraud upon the court."

NEWSPAPER CLIPPING FROM
JOURNAL OF COMMERCE

Dated Wednesday, February 14, 1979

BY ROBERT F. MORISON
Journal of Commerce Staff

WASHINGTON — Rep. John Murphy, D-N.Y., gave high marks Tuesday to Robert J. Blackwell, retiring assistant secretary of Commerce for Maritime Affairs.

"I regret" his decision to leave government service, Rep. Murphy, said, but he did draw consolation that Mr. Blackwell would be around long enough still to help with the forthcoming shipping negotiations with the Peoples' Republic of China (PRC).

Mr. Blackwell's announced departure, although anticipated for some time if only because of his having served as assistant secretary in both a republican and democratic administration over a continuous and unusually lengthy seven-year period, was nonetheless sudden.

However, there was one jarring note. That came from Mr. Blackwell's frequent antagonist on the "Hill", Rep. Paul N. McCloskey, R-Calif., ranking minority member of the House Merchant Marine and Fisheries Committee.

Rep. McCloskey said Mr. Blackwell's resignation was "long overdue," that there had allegedly been a "cloud" over him since mid-1977 when it was disclosed he had been offered a $100,000 a year post to head a then, new trade association composed of the subsidized lines.

Rep. McCloskey also rapped Mr. Blackwell for opposing oil cargo preference when it came up under ex President Ford's Republican administration and favoring it when it reappeared under Mr. Carter.

(Mr. McCloskey led the floor fight against that preference bill. He and Mr. Blackwell tangled frequently last year on both these issues.)

Rep. McCloskey said "probably" Mr. Blackwell "should not be blamed for the bankruptcy of two of the 10 subsidized lines, although both companies have attributed much of their failure to MA restrictions and regulation, particularly the subsidized ship designs which MA forced upon them."

Rep. McCloskey said the "dominoes are falling and the old order that allowed the U.S. merchant marine to fall into decay is passing away, happily to be replaced by a vigorous new administration."

Privately, Mr. Blackwell's decision to resign as of April 9 was lamented and in most quarters there was apprehension over his successor. None has been named or even hinted at.

Rep. Murphy said he considered Mr. Blackwell a "valuable executive who performed his duties in the highest tradition of government" service.

NEWSPAPER CLIPPING FROM
THE N.Y. TIMES

Dated Sunday, February 18, 1979

COURT TOLD OF PLAN TO INFLUENCE NIXON

A Witness in Massachusetts Says He Heard Ex-President Got Fund to Give Volpe Post

By MICHAEL KNIGHT
Special to The New York Times

BOSTON, Feb. 17 — An alleged plot to raise $500,000 to influence President Nixon's choice of a Republican running mate in 1972 was described here as the trial of two Massachusetts political operatives accused of extortion got under way.

The charges, which were first made last spring at the arraignment of the two, have repeatedly been scoffed at by aides to the former President and by John A. Volpe, a former Republican Governor here, in whose behalf the money was allegedly sought.

But Anthony E. Mansueto, a key prosecution witness, testified this week in Superior Court that he had been told the money was turned over to Mr. Nixon at the 1972 Republican Convention.

The trial is the latest outgrowth of this state's longest-running political scandal, which, since 1976, has resulted in the conviction of two State Senators on charges of extorting $40,000 from Mr. Mansueto's consulting company and has called into question the actions of two other former Governors, a number of other leading

state legislators and Kevin H. White, the Mayor of Boston.

View of Public Dealings

The trial of Albert Manzi, a member of the Massacuhsetts Turnpike Authority, and William Masiello, a longtime political go-between, also provided a rare public look into political dealings in this state.

In one incident described by Mr. Mansueto this week, Mr. Manzi, a fund raiser for Mr. Volpe and then-Gov. Francis Sargent, rose angrily at a restaurant frequented by Boston politicians and loudly denounced Mr. Mansueto for refusing to make a $15,000 "political contribution" in addition to a $10,000 payment he had made to Mr. Sargent's campaign fund in 1970.

"In Massachusetts you don't pay once," Mr. Mansueto said Mr. Manzi shouted before colleagues quieted him down. "You have a responsibility to contribute to the political party in power, or the political party not in power. It's time to pay your dues again."

Months later, Mr. Mansueto testified, he called Mr. Manzi and was told that the $500,000 goal had been reached. "You bastards — you were upposed to have given $25,000 and you only made 10," he quoted Mr. Manzi as saying. "In spite of you I made the kitty and the kitty was presented to Mr. Nixon, but not because of you guys. You guys didn't meet you commitment, and I'll take care of you."

An Engineering Consultant

Mr. Mansueto was a partner in the now-defunct New York engineering consulting concern of McKee, Berger, Mansueto Inc., which in 1969 was awarded a $2.2 million contract to oversee construction of the $150 million University of Massachusetts campus here. An audit of that contract in 1973 concluded that the state had been charged $457,000 for "services never received by the commonwealth," but the audit was not made public or acted upon until the contract scandal, which centered on widespread payoffs to

policial figures in connection with the contract, broke.

By that time officials of the consulting company had received immunity from state and Federal prosecution in return for their testimony against the two State Senators.

The two, Joseph J.C. DiCarlo, the former Democratic majority leader, and Ronald MacKenzie, the former Republican assistant minority leader, were convicted in 1977 of threatening to "make trouble" for the company unless they were given money. Mr. Manzi, along with Mr. Masiello, allegedly threatened to do the same if the payments were not made by Mr. Mansueto's company.

Both Mr. DiCarlo and Mr. MacKenzie served nine-month sentences in a Federal penitentiary. They charged before they were jailed that they were being "sacrificed" to protect "higher-ups."

Brennan Denies Story

Colonel John Brennan, an aide to Mr. Nixon in San Clemente, Calif., was quoted this week as calling the alleged money offer a "crazy story."

"If we commented on every one of these nutty stories, we'd have to have three press secretaries and we don't have any," he said.

Former Governor Volpe, who was President Nixon's Secretary of Transportation, was briefly considered as a Vice-Presidential candidate in 1968, but lost out to Spiro T. Agnew and was not seriously considered in 1972, Mr. Brennan said.

Despite the denials, however, Stephen R. Delinsky, chief of the State Attorney General's criminal division, told Judge Joseph R. Nolan this week: "I will prove at the trial the motive Mr. Manzi and Mr. Masiello had for doing what they are charged with."

Mr. Masiello, the owner of a Worcester architectural concern, has been a behind the scenes political go-between for 20 years, Mr. Manzi was suspended from his position as a member of the turnpike au-

thority after his arrest last spring. The trial, which is being heard without a jury at the request of the defendants, will continue next week.

A special legislative commission charged with looking into the scandal heard testimony last year about the $10,000 payment to former Governor Sergant and the role of his predecessor, former Gov. Endicott Peabody, as a lobbiest in helping the company obtain the consulting contract, which allegedly involved payments to other state legislators and Mayor White.

All have denied any wrongdoing in the affair, including Kevin Harrington, the former President of the State Senate, who acknowledged that a check from the company was cashed on his bank account and bore his endorsement. He denied any knowledge of the money, however, and retired from public life last year.

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